U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 04Apr2002

CASE NUMBER: 2001-LHC-2550

OWCP No.: 07-148767

IN THE MATTER OF

KENNETH MARSH, JR.,
Claimant

v.

P&O PORTS OF GULFPORT (I.T.O.)
Employer/Carrier

APPEARANCES:

Rick Olando Amos, Esq.
On behalf of Claimant

Donald P. Moore, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Kenneth Marsh (Claimant) against P&O Ports of Gulfport (I.T.O.) (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on December 13, 2001, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced

sixty-two exhibits which were admitted, including: letters of recommendation for retraining; Claimant's statement to Employer; Claimant's deposition; medical records and reports from Drs. J. Gregory Kinnett and Roger Reed; the deposition of Dr. J. Gregory Kinnett; medical records from Gulf Coast Medical Center Radiology Consultation and Garden Park Community Hospital; wage and earnings records; a vocational report by Sherry J. Carthane; Department of Labor filings; federal district court filings; various correspondence; and Employer's discovery responses.[1] Employer introduced twenty exhibits which were admitted including: Department of Labor Filings; various correspondence; the deposition of Dr. Roger Reed; records from Head Start; a vocational report from Nancy Favaloro; Claimant's discovery responses; federal district court documents; Claimant's deposition; and the deposition of Mike Wren.

At hearing, Claimant attempted to introduce the affidavit of David Caldwell, a co-worker, who, according to his affidavit, noticed that Claimant was in pain on September 8, 1997, that Claimant slowed the pace of his work, and that Claimant complained that his back and neck were hurting. (CX 11). David Caldwell also stated that no one ever told him what procedures to follow if he was hurt on the job. *Id*. Both Claimant and Employer listed him as a witness. I initially allowed the affidavit into evidence subject to Employer's right to depose Mr. Caldwell post-hearing. (Tr. 14-15, 291-92). Employer's brief, dated March 1, 2002, stated that through a diligent search, Mr. Caldwell was unable to be located, even with assistance from Claimant's counsel.

When a declarant is unavailable to testify at hearing, and the declarant's testimony goes to the truth of the matter asserted, i.e., that Claimant was injured at work and did not know the proper procedures for reporting an injury, the statement may be admitted if it falls within an exception to the hearsay rule. *See* 29 C.F.R. § 18.804(b)(5)(2001). That section provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness to the aforementioned hearsay exceptions, [is not excluded by the hearsay rule] if the judge determines that -
> (i) The statement is offered as evidence of a material fact;
> (ii) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
> (iii) The general purposes of these rules and interests of justice will best be served by admission of the statement into evidence. However a statement may not be admitted under this exception unless a proponent of it makes it known to the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

29 C.F.R. § 18.805(b)(5) (2001).

Here, I find that the affidavit of David Caldwell does not have any "circumstantial guarantees of trustworthiness" that would warrant an exception to the hearsay rules. Specifically, the affidavit was taken on July 27, 1998, long after the alleged injury on September 8, 1997. Other than Claimant's own self-serving statements, no other evidence in the record corroborates the fact that Claimant suffered an injury at work or rebuts the statements of Employer's witness regarding procedures for reporting work-related injuries. Additionally, Employer was not given the opportunity to cross-examine David Caldwell following a diligent search after the close of the hearing. *See Southern Pacific Co. v. Wilson*, 378 F.2d 533, 537 (5th Cir. 1967)(finding an affidavit, not subject to cross-examination, properly admitted and not denying the opposing party's right to due process considering its insignificant importance and lack of probative value). After considering the importance of David Caldwell's affidavit - potentially establishing a causal connection to work and excusing late notice - I find that in the interest of justice requires the affidavit to be excluded from evidence based on the Employer's right to due process, and the inherent untrustworthiness of the unsupported and uncorroborated assertions in the affidavit.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. That an employer-employee relationship existed that the time of the accident;

2. Employer timely filed a Notice of Controversion;

3. No compensation has been paid to Claimant; and,

4. No medical benefits have been paid to or on Claimant's behalf.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Timely notice of injury and timely filing of claim;

2. Causation;

3. Nature and extent of injury and date of maximum medical improvement;

4. Suitable alternative employment;

5. Medical benefits and Section 7 authorization;

6. Average weekly wage; and,

7. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Prior to working for Employer Claimant spent twenty-two years working for Anchor Glass as a plastic shield operator. (Tr. 107). Claimant stopped working there when the plant closed, and in 1991 Claimant obtained an air, refrigeration and heating license. (Tr. 107). Afterwards, Claimant was self-employed in the air-conditioning and refrigeration business. (Tr. 105). In 1993, Claimant began working for Employer as lift truck driver in the "chicken boat." (Tr. 107-08). Claimant also performed maintenance and mechanic work on chassis' for Chiquita Banana Company on behalf of Employer. (Tr. 108).

Prior to his workplace injury of September 8, 1997, Claimant was involved in other litigation for personal injuries. In 1985, Claimant was struck in the face with a bat and he recovered $100,000. (Tr. 194). In 1995, Claimant was involved in two motor vehicle accidents for which he received $3,000 for one and $75,000 for the other. (Tr. 194-95). In 1997, Claimant filed an Equal Employment Opportunity (EEOC) and Americans with Disabilities Act (ADA) complaint's against Employer. (Tr. 116, 194). On January 19, 1999, the court dismissed Claimant's ADA suit with prejudice. (EX 15, p. 29).

From October 1993, to January 1995, Claimant worked for Employer without restrictions until he became involved in an automobile accident after leaving work in January 1995. (Tr. 112). As part of his January 1995 motor vehicle accident Claimant suffered a herniated disc in his back for which he had surgery in November of 1995. (Tr. 113). His treating physician, Dr. Kinnett released Claimant to return to work on January 15, 1997, relating that Claimant "could return to his normal and former employment."[2] (Tr. 114; CX 13). Between January 1995, and January 17, 1997, Claimant never attempted to work for Employer, but he did continue his self employment in air-conditioning and refrigeration. (Tr. 115-16; EX

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[2] Dr. Kinnett thought this meant Claimant's "previous occupation as a heavy equipment operator" and Claimant testified in a deposition that Dr. Kinnett did not give him any restrictions because "he was under the impression that I was going back to do heavy equipment maintenance work." (Tr. 215; EX 18, p. 33; CX 55, p. 17).

12, p. 5). After obtaining the return to work slip from Dr. Kinnett on January 17, 1997, Claimant took it to Donald Evans, the president of International Longshoremen's Association Local 1303 (Local 1303), and Mike Wren, the vice president for Employer. (Tr. 115).

Employer, however, refused to hire Claimant stating that there was no position available for him. (Tr. 115-16; EX 19, p. 13). Employer suggested that to gain employment Claimant should submit his work card to Local 1303 like all other longshoremen. (EX 19, p. 13). On February 25, 1997, Claimant wrote a letter to Employer asking for either part-time or full-time employment. (CX 49). Claimant did not submit his work card to Local 1303, however, until August 1997, because Claimant was pursuing other options through the EEOC. (Tr. 116-17). Also during this time period, Claimant continued to contact Mike Wren, vice president for Employer, about being rehired but Claimant was without success. (Tr. 116-17). In August 1997, Claimant began to submit his work card to Local 1303 and from August 5, 1997, to September 5, 1997, Claimant submitted his card on sixteen occasions before being hired on September 8, 1997, to work in the chicken boat.[3] (Tr. 123, CX 50).

On September 8, 1997, Claimant was in the hold of the vessel throwing thirty-five to forty pound boxes of frozen chickens. (Tr. 123). An hour-and-a-half to two hours after Claimant began working, his neck became stiff. (Tr. 124). Claimant's work pace slowed and at lunch he remarked to a co-worker that he was experiencing problems with his neck. (Tr. 125). Attributing the stiffness to the below zero temperature, Claimant continued working and finished his nine hour shift. (Tr. 124). The next day Claimant called Dr. Kinnett about his symptoms. (Tr. 124). Claimant continued to submit his work card to the Local on September 15-16, 22-23, 1997, but was not hired. (CX 50).

On September 16, 1997, Claimant went to his family physician, Dr. Reed, but did not discuss his workplace injury on September 8, 1997. (Tr. 208). Rather, Claimant's appointment with Dr. Reed was in regards to depression. *Id*; (EX 9, p. 25). Nonetheless, Dr. Reed did make a notation that part of the reason Claimant was depressed was because he "lost his job due to herniated disc in neck - (MVA)." (EX 9, p. 25).

The very next day, however, Claimant went to Dr. Kinnett complaining of stiffness in the posterior cervical area, numbness in the fingers of the left hand and pain in the trapezius area which Claimant related to his stacking of boxes weighing thirty to sixty pounds in the hull of a ship for nine hours. (EX 8, p. 7). A x-ray revealed solid arthrodesis at C5-6, minimal narrowing at C4-5 and C6-7 disc levels with some evidence of neural foraminal stenosis. *Id*. Dr. Kinnett diagnosis was a possible cervical radiculopathy and issued work restriction limiting Claimant to lifting twenty pounds with no overhead work. *Id*.

Claimant sent a copy of his work restrictions to the president of Local 1303 who responded that no work was available that met his restrictions. (Tr. 128, EX 35). After September 8, 1997, Claimant has

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[3] According to Claimant's testimony, the EEOC stated that Claimant could return to work and that is why Claimant began to submit his work card to Local 1303 in August. (Tr. 117).

not worked for Employer. (Tr. 131). After his workplace injury, however, Claimant continued to operate his air, refrigeration and heating business, and installed a four ton air-conditioning unit and coil on September 21, 1997. (EX 12, p. 114-116).

Dr. Kinnett remarked that Claimant's cervical complaints had resolved "nicely" by October 15, 1997, but without a specific antecedent event, Claimant experienced severe pain in his right shoulder. (EX 8, p. 6). Dr. Kinnett diagnosed the problem as impingement syndrome with rotator cuff tendinitis and resolving cervical disc disease. *Id*. Because of the new symptoms Dr. Kinnett extended Claimant's work restrictions and recommended that Claimant undergo training for a new vocation. *Id*. On a April 1, 1998 return visit, Dr. Kinnett detected solid, stable anterior cervical anthrodesis and multilevel disc disease with neural foraminal stenosis as evidenced by "marked narrowing of the disc spaces at two levels above [C6-7]." *Id*.

In May 1998, Dr. Kinnett told Claimant he needed an MRI, and Claimant contacted Employer on May 28, 1998, to initiate his workers' compensation claim. (Tr. 133; CX 36). Claimant testified that it was not until his May 13, 1998, visit with Dr. Kinnett that he discovered that his injury on September 8, 1997, was connected to his work. (Tr. 134). Prior to that date Dr. Kinnett had only attempted treatment with medication and the need for an MRI prompted Dr. Kinnett to tell Claimant that he needed to contact his Employer. (Tr. 144). All of Claimant's medical bills incurred after September 8, 1997 were paid by Claimant.[4] (Tr. 189). After sending his letter to Employer advising it of his workplace accident, Employer called Claimant the next day to obtain a written statement. (Tr. 183; CX 7, p. 1). On October 3, 1998, Claimant filed his official claim for compensation with the deputy director. (Tr. 145; CX 42).

An MRI performed on November 5, 1998, showed cervical disc disease at 4-5, solid union at 5-6 and a herniated disc at 6-7. (EX 8, p. 4) An EMG study performed on November 16, 1998, was consistent with bilateral early ulnar neuropathy as well as C4-5, 5-6 radiculopathy and Dr. Kinnett opined that Claimant may need more surgical intervention in the future. *Id*. By September 20, 1999, however, Claimant elected to continue with cervical precautions, and at follow up visit on September 20, 2000, Claimant continued to complain of limitation in his range of motion. *Id*. at 3. A x-ray showed evidence of cervical disc disease at 4-5 and 6-7. *Id*. On October 9, 2000, Claimant related that he had trouble turning his body to back-up his automobile. *Id*. at 2. On Claimant's last documented treatment date, November 19, 2001, Dr. Kinnett remarked that Claimant still had significant problems with his left shoulder, marked weakness, inability to abduct, and inability to use his upper extremity effectively. (CX 53, p.1).

B. Claimant's Testimony

Claimant testified that his job entailed "driving a lift truck and hooking on and throwing chicken boxes." (Tr. 109). The boxes of frozen chicken - each weighing thirty-five to forty pounds - were stacked

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[4] In May 1998, Claimant settled his lawsuit stemming from a January 1995 motor vehicle accident for a substantial sum of money.

to the ceiling, and often two boxes would freeze together. (Tr. 109-10). The majority of Claimant's work between October 1993, and October 1994, however, was as a mechanic with Chiquita . (Tr. 110). Of the 900 hours Claimant worked during that year, he spent about 480 hours as a mechanic, less than 300 working on the chicken boat and 100-200 working with the stevedores. (Tr. 111).

After Claimant was released to return to work by Dr. Kinnett in January 1997, Claimant testified that he submitted his longshore work card to the Local but the individuals selecting the work gangs refused to hire him. (Tr. 120). On one occasion, everybody in the hall was hired but Claimant, who had his work card rejected and thrown from the window. *Id*. Claimant testified that the reason for this animosity was because he had filed an ADA case against the company and the union. *id*. Also, Claimant stated that the president of Local 1303 told Claimant's old foreman not to hire Claimant because he was not in good standing with the Local due to his pending complaint with the EEOC. *Id*.

Once Dr. Kinnett told Claimant he needed an MRI on March 13, 1998, Claimant contacted Employer on May 28, 1998, to initiate his workers' compensation claim. (Tr. 133; CX 36). Claimant testified that it was not until his May 13, 1998, visit with Dr. Kinnett that he discovered that his injury on September 8, 1997, was connected to his work. (Tr. 134, 190). According to Claimant, Dr. Kinnett stated that his longshore work had aggravated his disease and that medicine was not going to help him. (Tr. 134). Prior to that date Dr. Kinnett had only attempted treatment with medication and the need for an MRI prompted Dr. Kinnett to tell Claimant that he needed to contact his Employer. (Tr. 144).

Claimant alleged that Carrier controverted his claim because Employer did not send Dr. Kinnett's letter dated September 17, 1997, detailing Claimant's work restrictions, but only sent medical records in relation to Claimant's 1995 motor vehicle accident. (Tr. 135). Indeed, Claimant never received any workers' compensation stemming from his September 8, 1997 injury. (Tr. 144-45).

Claimant further testified that he had not reached maximum medical improvement because Dr. Kinnett wanted to have an MRI done of Claimant's neck and shoulder to better comprehend Claimant's problem. (Tr. 145). As of the date of hearing, Claimant testified that he still experienced stiffness, numbness and pain in his fingers, neck and shoulders. (Tr. 145). His condition was such that he could not pick up a gallon of water in his left hand. (Tr. 145-46). Claimant also testified that he had trouble carrying objects, he experienced pain when he lays on his side, and could not turn his body properly to look behind him. (Tr. 146-47).

Regarding his air, refrigeration and heating contract with Head Start, Claimant testified that he charges much less than the going rate, even performs a large portion of the work for free, in order to secure that particular contract. (Tr. 150). Claimant stated that he could not ethically charge the same hourly rate as another service provider because it takes him longer to perform the same work due to his physical condition. *Id*. Claimant's main job for Head Start was to clean and change air conditioning filters, occasionally add Freon to the unit, but sometimes Claimant was required to change the entire air-conditioning unit. (Tr. 151). When that situation arises, Claimant obtains help to do any heavy lifting. *Id*. Claimant further testified that he could not do his job effectively due to his condition and would often have

to go back over a previously finished task. (Tr. 152). Accordingly, Claimant did not think that he could work for another air-conditioning company because that employer would be unable to send him out on jobs and he could not do equal work as compared to other employees. (Tr. 152).

C. Testimony of Joseph Untereiner

Mr. Untereiner, the operations manager for Employer, testified concerning Employer's policy for reporting injuries. (Tr. 240). Mr. Untereiner testified that all employees are told at safety meetings that if they have an accident they should always report that incident before they leave the vessel. *Id*. An injured worker should first report the injury the worker's foreman, who then goes to the superintendent of the job, an accident report is filled out, and the employee is then taken to the doctor. (Tr. 240-41). Employer has safety personnel who investigates an accident to see why it happened and to try to prevent a reoccurrence in the future. (Tr. 254). Although the policy of Employer is to immediately report an accident before leaving the vessel, fill out a report, and take the employee to see a doctor, Mr. Untereiner stated that the procedure was different when an employee notified Employer of an injury by mail. (Tr. 257). In mail notification case, Mr. Untereiner contacts the claims department to investigate the matter. (Tr. 258).

In the past month, Mr. Untereiner testified that Employer had loaded four "chicken boats," which, depending in the tonnage - ranging from 2,000 to 7,000 - translates into an intermittent work schedule of three to five days a week per boat with time off in between boats. (Tr. 243-244). Mr. Untereiner further calculated the pay scale for longshoremen working in the "chicken boats" was $14.00 per hour for 1997, and determined that there were no similarly situated workers to use in a Section 10(b) wage calculation. (Tr. 244-49). Additionally the twenty annual earnings of other employees that Mr. Untereiner produced were not by employees who performed the same job as Claimant on a regular basis. (Tr. 284). Each individual could work as much, or a little as he wants depending on the availability of work and type of work. (Tr. 251).

Mr. Untereiner also stated that Claimant's work as a mechanic for Chiquita, paid much higher wages than work on the "chicken boats." (Tr. 253). While Claimant could earn fourteen dollars an hour throwing chickens, he could earn twenty-five dollars an hour as a mechanic. (Tr. 253).

On cross-examination Mr. Untereiner stated that he had only worked at the Gulfport facility as a five-a-day employee since 1999, and that he did not know the safety personnel who was in charge during the time Claimant was injured. (Tr. 256). As such, Mr. Untereiner had never attended one of the safety meetings that he alleged were held on a regular basis. *Id*.

D. Testimony and Vocational Report of Nancy Favaloro

Ms. Favaloro, a vocational rehabilitation counselor, met with Claimant on December 3, 2001, and issued a report on December 7, 2001, complementing a report that she had undertaken on November 20, 2001, before having the benefit of meeting Claimant. (Tr. 18-19; EX 13). Vocational testing revealed that Claimant could identify words on the fifth grade level, read and understand language at the ninth grade level,

and that Claimant had a mathematical ability between the sixth and seventh grade levels. (Tr. 21; EX 13, p. 4).

When questioned about his air-conditioning and refrigeration business, Claimant stated that he mostly did repair work, and when he had to do a major repair he would hire a helper. (Tr. 22). Claimant also stated that his contract with Head Start paid between nineteen and twenty-thousand dollars a year, plus an additional three-thousand for performing different aspects of the contract. *Id*.

Ms. Favaloro reported that Claimant had achieved transferrable skills, such as the ability to apply common-sense, understanding, how to carry out instructions, how to keep records, and how to use tools. (Tr. 23). According to the Dictionary of Occupational Titles, Claimant's work as a air-conditioning and refrigeration mechanic requires general intelligence in tasks dealing with verbal and numerical skills. (Tr. 24). Claimant was also attending computer classes. *Id*. Ms. Favaloro actually met with Claimant for approximately thirty-minutes and spent approximately forty-five minutes administering testing. (Tr. 50).

In her December 7, 2001, report Ms. Favaloro identified full-time jobs that were compatible with Claimant's transferable skills in the Gulfport, Mississippi area. (Tr. 27, 31; EX 13, p. 5-6). Those jobs were: Valet Dispatcher, Projectionist, Assembly Worker, Unarmed Security Guard, Fuel Desk Agent, and Dispatcher, all of which paid between $6.00 and $7.50 per hour. (EX 13, p. 5-6). Ms. Favaloro related that all of these positions were within the lifting restrictions set by Dr. Kinnett, i.e., no lifting over twenty pounds and no overhead work. (Tr. 30).

In her November 20, 2001, report, Ms. Favaloro identified jobs in the air-conditioning and refrigeration business that she deemed appropriate for Claimant. (EX 13, p.2). According to the Bureau of Labor Statistics, the median wage for air-conditioning/refrigeration mechanics in the Gulfport/Biloxi area is $11.82 per hour. *Id*. Of the five different employers surveyed, pay scales ranged between ten and eighteen-dollars per hour, but Claimant could be expected to earn more based on his experience. (Tr. 32-33; EX 13, p. 2-3). All the employers agreed that Claimant was capable of performing these jobs based on Claimant's abilities and experience as related by Ms. Favaloro. (Tr. 33-34).

On cross-examination, Ms. Favaloro admitted that she did not have the 2001, treatment notes by Dr. Kinnett, but she stated that they were not necessary because Claimant's restriction had not changed. (Tr. 38). When asked about Dr. Kinnett's notation that Claimant should continue "with guarded activity" in reference to his cervical spine and would return to a follow-up visit in March 2001, Ms. Favaloro testified that she did not know what Dr. Kinnett meant by that statement in the absence of a more definitive assertion. (Tr. 39). Also, When contacting the potential employer's, Ms. Favaloro's assistant did not relate Claimant's work restrictions or his correct age. (Tr. 42, 54). Ms. Favaloro did not tell any of the prospective employers that Claimant would require a helper for any heavy lifting or for changing out air-conditioning units. (Tr. 52). For the jobs listed in the December 7, 2001 report, however, Ms. Favaloro indicated that Claimant's work restriction were related to the prospective employers. (Tr. 56). The results of Claimant's vocational testing, however, were not related. (Tr. 60).

E. Testimony and Vocational Report of Sherry Carthane

Dr. Carthane, a vocational rehabilitation counselor with a PhD in Counseling Psychology, examined Claimant on November 2, 2001, and issued a report on November 16, 2001. (Tr. 74-75; CX 28, p.1). Dr. Carthane spent approximately four hours with Claimant trying to understand his physical abilities. (Tr. 75). Dr. Carthane described Claimant's current employment for Head Start as "modified work" meaning that it is not full time and that he works as needed. (Tr. 77).

Based on Dr. Kinnett's restrictions, Dr. Carthane determined that Claimant's ability to work is very limited. (Tr. 81). A light duty position would be best suited for Claimant because sedentary work, which entails sitting all day, would cause problems with Claimant's cervical radiculopathy. (Tr. 83). Sedentary work would require Claimant to sit with his head forward in a flexed position which would stress the cervical spine. *Id*. Also, Claimant's limited range of motion and his age are barriers for finding suitable work. *Id*. Thus, Dr. Carthane opined that Claimant was able to perform work at a modified-light duty position. (Tr. 97). Claimant's current position, under a contract from Head Start, meets the modified-light duty requirements in the manner that Claimant' performs his work. (Tr. 101).

Dr. Carthane reviewed Ms. Favaloro's report, and stated that she felt it was important to obtain a correct age. (Tr. 84). Additionally, Ms. Favaloro's November 2001 report was not helpful because it did not list Claimant's impairments, capabilities, prior job description, and using a statistical median of salaries was not a good indicator of what Claimant could earn at a particular job. (Tr. 84-85). Also, the fact that Claimant would have to hire a helper would significantly reduce his hourly wage if he had to pay the helper out of his earnings. (Tr. 86).

Regarding Ms. Favaloro's December 7, 2001, report, Dr. Carthane took issue with the fact that Ms. Favaloro did not conduct the underlying research herself and did not obtain the name or title of the person that was interviewed about the potential position over the phone. (Tr. 87). Restrictions, age, and educational background are critical elements of the interview which were not communicated to the potential employers by Ms. Favaloro or her assistant. (Tr. 88). According to Dr. Carthane, given Claimant's age, education, background and restrictions, he could obtain simple, unskilled and repetitive work, generally paying between $5.15 and $6.00 per hour. (Tr. 89).

F. Exhibits

(1) Medical Records from Dr. Sydney Smith

Dr. Smith, a clinical neurologist, treated Claimant on December 12, 1985, for continuing problems with his headaches after a July 31, 1985, incident where he was "mauled and struck in the head several times with a bat and punched." (EX 9, p. 47). Clamant complained of daily headaches lasting thirty to thirty-five minutes. *Id*. The headaches were brought on by exercise, but were not associated with rigidity, nausea, vomiting, teichopsia, blurred vision, or loss of consciousness. *Id*. A neurological examination was normal and Dr. Smith diagnosed a simple post-concussion migraine. *Id*. By March 12, 1986, Dr. Smith

stated that there was no reasonable test that had not been done to treat Claimant's headaches and counseled Claimant on the phenomena of compensation neurosis, and how that could be a psychological set-up which would cause his pain to continue. *Id*. at 62. Dr. Smith arranged for Claimant to see a psychologist in an effort to determine what would trigger his pain. *Id*.

Claimant was then treated by Dr. Whiting, a clinical psychologist, who on July 11, 1986, after three different sessions, opined that Claimant was not suffering from any psychological disability. (EX 9, p. 71). Dr. Whiting also denied that there was any secondary gain issues as he found Claimant "extremely compliant, courteous and [a] sociable person who [was] genuinely interested in doing whatever he can to rid himself of the periodic headaches which render him incapacitated." *Id*.

On a follow-up appointment with Dr. Smith, Claimant continued to complain of headaches, now reduced to about twice per week, that lasted approximately an hour and a half. (EX 9, p. 61). The intensity of the headaches, however, were more severe and Claimant felt that they were generally more incapacitating than he had previously experienced. *Id*. Dr. Smith only change in treatment was to change Claimant's prescription. *Id*. By June 24, 1986, Dr. Smith related that Claimant's headaches were "2/7ths of what they were originally" but reiterated that his headaches were psychologically induced since no other migraine therapy had helped at all. *Id*. at 60. On June 30, 1986, Claimant called Dr. Smith seeking an excuse for missing work because he overslept after taking his medication. *Id*. at 59. Although Dr. Smith issued the excuse, he opined that Claimant was "potentially a patient abusive of the system," noting that Claimant's headaches were uncommonly frequent when he was supposed to work on the weekends. *Id*.

On September 22, 1986, Dr. Smith opined that none of the medication that he prescribed had helped, and as Dr. Whiting did not think that there was any physiological basis for the headaches, and he did not find any organic causes for the headaches, Dr. Smith diagnosed refractory migraine syndrome or post-concussion syndrome, which has no organic or psychological basis, but is simply a clinical situation. (EX 9, p. 59). Reasoning that Claimant might have a etiology totally unrelated to his July 31, 1985, beating, Dr. Smith recommended a MRI scan to determine if there was a possibility of arteriovenous malformation. *Id*. That scan, however, was normal. *Id*. at 58. On October 6, 1986, Dr. Smith noted that a second opinion produced no salient insight, and since no medication was particularly helpful to Claimant, Dr. Smith opined that Claimant should quit taking any prophylactic medications. *Id*. On January 22, 1987, Dr. Smith stated that neurology had nothing to offer Claimant and left treatment in the hands of Dr. Reed. *Id*. at 57.

(2) Medical Records for Garden Park Community Hospital

On February 23, 1988, Claimant presented to the hospital relating that he fell from a ladder injuring his right elbow, right knee, and posterior right hip. (EX 9, p. 51). No bruising or swelling was noted and Claimant was able to walk without difficulty. *Id*. A hospital physician diagnosed a contusion to the right elbow, hip, and knee. *Id*. Claimant was discharged with instruction to use an ace bandage, an ice pack and pain medication. *Id*.

On June 23, 1988, Claimant went to the hospital after a co-worker poked him in the right cheek. (EX 9, p. 50). Claimant complained that the right side of his face hurt and was diagnosed with a mild face contusion and advised on the use of an ice pack and pan medication. *Id*.

On February 6, 1989, Claimant went to the hospital complaining of migraines and nausea. (EX 9, p. 49). A hospital physician prescribed medication and instructed Claimant to follow up with Dr. Reed as needed. *Id*. Claimant returned on August 8, 1989, October 14, 1989, and November 25, 1989 complaining of headaches/migraine pains. *Id*. at 42-43, 46.

(3) Medical Records of Dr. Reed

Claimant had experienced several prior work injuries as documented by his family physician, Dr. Reed. On March 27, 1984, Claimant complained of smoke inhalation when plastic foam caught on fire and he attempted to put out the flames. (EX 9, p. 83). Claimant was discharged the same day without any significant symptoms. *Id*. On April 14, 1985, Claimant was treated by Dr. Reed for left flank pain for which Dr. Reed prescribed a muscle relaxant. *Id*. at 81. A subsequent x-ray showed no abnormality, an EEG produced normal results, and a CT scan of Claimant's head was unremarkable. *Id*. at 77-79. On November 9, 1985, Claimant was injured at work when a pallet of Coke bottles fell onto his left side pinning him against a rail. *Id*. at 76. Claimant was diagnosed the a minor contusion on his left hip. *Id*. On August 29, 1990, Claimant suffered a workplace contusion to his scalp when he was hit in the head by two or three bottles that fell approximately twenty feet. (EX 9, p. 38-39). Dr. Reed authorized an injection for Claimant and advised him on home care, but returned Claimant to work on the next day. *Id*. at 39.

On January 18, 1995, Claimant was injured in a motor vehicle accident when another driver rear-ended his vehicle. (EX 9, p. 16). Claimant was only wearing a lap belt and presented to Dr. Reed on January 20, 1995, complaining of neck pain, left shoulder pain and left side pain that traveled down his left leg. *Id*. After recommending the use of a cream, Claimant came for a follow up on January 27, and February 3, 1995, indicating that he was not as sore, but he still had sharp pains down his left leg, a sore left shoulder, numbness in the fourth and fifth left fingers, and soreness in his neck. *Id*. at 14-15.

On February 14, 1995, Dr. Reed conducted a neurological assessment noting a normal mental status examination, a full range of motion in the neck and low back, but some tenderness in the lower cervical, upper thoracic, and rhomboid areas. (EX 9, p. 18). A sensory exam revealed decreased sensation in the ulnar C-8/T1 distribution of the left hand. *Id*. at 19. Dr. Reed opined that Claimant had an ulnar injury to his elbow with a possible injury to the C-8/T-1 root. *Id*.

On February 22, 1995, Claimant underwent a nerve conduction EMG, but could not tolerate the shocks. (EX 9, p. 20). Claimant did have C-7/T-1 denervation and an MRI revealed spinal stenosis due to arthritis which pre-existed his motor vehicle accident. *Id*. Testing also revealed a central disc herniation with bilateral root involvement at 5/6, a herniation at 6/7 which was compressing the spinal cord, and osteophyte at 4/5 along with broad disc herniation. Claimant also had arthritic changes at 3/4 that were unrelated to the motor vehicle accident. *Id*. The following September, Claimant had a second motor

vehicle accident and complained of neck pain among other symptoms. *Id*. at 12.

In regards to Claimant's depression, Dr. Reed's notes indicated that on September 16, 1997, Claimant complained of depression, inability to sleep, bouts of crying, loss of temper and suicidal thoughts. (EX 9, p. 6). Claimant also stated that he was behind on bills, had lost his job because of a herniated disc and the company refused to hire him back. *Id*. By September 23, 1997, Claimant stated that he was no longer suicidal, but throughout October and November 1999, Claimant still suffered from bouts of crying, loss of appetite, and difficulty sleeping. *Id*. at 2, 4.

(4) Deposition of Dr. Reed

Employer noticed the deposition of Dr. Reed on March 31, 1998. (EX 10, p. 1, 4). Dr. Reed stated that a patient's history is important in making a diagnosis and in receiving a history he assumes that what the patient tells him is true instead of seeking independent verification. *Id*. at 7-8.

In September of 1997, Dr. Reed diagnosed and discussed depression with Claimant after Claimant related that he lost his job, he was hurt and that nothing was going right for him. (EX 10, p. 9-10). Although Claimant expressed suicidal thoughts, Dr. Reed did not think those thoughts were sufficient for hospitalization. *Id*. at 12. Dr. Reed's diagnosis of depression was made because Claimant was "emotionally liable." *Id*. at 14. Claimant cried in the office, complained of lack of interest, weight loss, irritability, and short temper. *Id*.

Based on the information Claimant related, Dr. Reed could not trace the etiology of Claimant's depression to any action by the Employer. (EX 10, p. 12). About half the population will suffer from depression at some time during their life, and Dr. Reed recognized that Claimant has several "life stresses" in that he was injured in two motor vehicle accidents, was severely beaten with a baseball bat, and involved in multiple lawsuits, but Dr. Reed could not differentiate possible causes for Claimant's depression from those factors. *Id*. at 14-16. Dr. Reed did not refer Claimant to a psychologist or a psychiatrist because he opined that most people respond to anti-depressant medication, and as long as the patient was not a threat to himself, Dr. Reed said that he would take his time in treating the patient. *Id*. at 13.

Concerning compensation neurosis, Dr. Reed acknowledged that Dr. Smith had counseled Claimant on the phenomenon in 1986, and while Dr. Reed never shared the same concerns, Dr. Reed stated that Claimant had a tendency to "hang on" as demonstrated by the duration of Claimant's earlier headaches. (EX 10, p. 18-19). Also, Dr. Reed considered it "significant" that he first treated Claimant for depression in September 16, 1997, and a lawsuit was filed within a month of that visit. *Id*. at 22.

Since the date of the accident in January 1995, Dr. Reed had never placed any type of restriction on Claimant. *Id*. at 24. Indeed, Dr. Reed did not have any records indicating that Claimant had a disability or an impairment as of January 15, 1997 even though he treated him several times during that year. *Id*. at 29-30.

(5) Medical Records of Dr. Kinnett

Dr. Kinnett, an orthopaedic surgeon, first treated Claimant on June 2, 1995, in relation to severe pain in the posterior cervical area, primarily on the left posterior shoulder following a January 18, 1995, motor vehicle accident. (EX 8, p. 11). A physical exam revealed a limited range of motion with weakness of the intrinsic musculature in the left hand. *Id*. A film of the cervical spine indicated disc space narrowing at C4-5, 5-6, and 6-7. *Id*. Disc narrowing was most notable at C5-6, and that area also had an anterior osteophyte formation and a suggestion of a neural foraminal stenosis. *Id*. Dr. Kinnett also found evidence of posterior protrusion at 4-5 and 6-7, and to a greater extent at 5-6, with bilateral neural foraminal encroachment, but did not see any fractures or dislocations. *Id*. An MRI of the cervical spine on February 16, 1995, showed evidence of a herniated nucleus pulposus of C5-6 with bilateral neural forminal impingement. *Id*. at 10. A central right-sided C6-7 disc herniation abutted the central cord and there was also posterior osteophyte formation with disc protrusion at 4-5. *Id*.

Dr. Kinnett opined that Claimant was not able to return to work and opined that surgery may be necessary if treatment of non-steroidal anti-inflammatories and selective neural foraminal injections were unsuccessful. (EX 8, p. 10). By June 26, 1995, Claimant's condition had not shown any improvement, and Claimant elected to undergo an anterior cervical discectomy at C5-6 with a left iliac crest bone graft. *Id*. Due to insurance delays, the surgery did not occur until October 31, 1995. *Id*. at 9. On December 18, 1995, Claimant returned to Dr. Kinnett and related that he had no numbness, paresthesias, motor weakness, headaches or neck pain. *Id*. Indeed, a physical exam revealed that all his wounds were benign and x-rays showed excellent maintenance and alignment. *Id*. On June 7, 1996, Dr. Kinnett remarked that Claimant's graft was stable and on January 15, 1997, fourteen months post-surgery, Dr. Kinnett opined that Claimant was asymptomatic and Dr. Kinnett released Claimant to return to his regular form of employment. *Id*. at 8.

On September 17, 1997, however, Claimant returned to Dr. Kinnett complaining of stiffness in the posterior cervical area, numbness in the fingers of the left hand and pain in the trapezius area after stacking boxes weighing thirty to sixty pounds in the hull of a ship for nine hours. (EX 8, p. 7). A x-ray revealed solid arthrodesis at C5-6, minimal narrowing at C4-5 and C6-7 disc levels with some evidence of neural foraminal stenosis. *Id*. Dr. Kinnett diagnoses was a possible cervical radiculopathy and issued work restriction limiting Claimant to lifting twenty pounds with no overhead work. *Id*.

Claimant's cervical complaints resolved "nicely" by October 15, 1997, but without a specific antecedent event, Claimant experienced severe pain in his right shoulder. (EX 8, p. 6). Dr. Kinnett diagnosed the problem as impingement syndrome with rotator cuff tendinitis and resolving cervical disc disease. *Id*. Because of the new symptoms Dr. Kinnett extended Claimant's work restrictions and recommended that Claimant undergo training for a new vocation. *Id*. On a April 1, 1998 return visit, Dr. Kinnett detected solid, stable anterior cervical anthrodesis and multilevel disc disease with neural foraminal stenosis as evidenced by "marked narrowing of the disc spaces at two levels above [C6-7]." *Id*.

An MRI performed on November 5, 1998, showed cervical disc disease a 4-5, solid union at 5-6 and a herniated disc at 6-7. (EX 8, p. 4) An EMG study performed on November 16, 1998, was consistent with bilateral early ulnar neuropathy as well as C4-5, 5-6 radiculopathy. *Id*. Dr. Kinnett opined that Claimant may need more surgical intervention in the future. *Id*. By September 20, 1999, however, Claimant elected to continue with cervical precautions and at follow up visit on September 20, 2000, Claimant continued to complain of limitation in his range of motion. *Id*. at 3. A x-ray showed evidence of cervical disc disease at 4-5 and 6-7. *Id*. On October 9, 2000, Claimant related that he had trouble backing-up his automobile because he could not turn his body. *Id*. at 2. On Claimant's last documented treatment date, November 19, 2001, Dr. Kinnett remarked that Claimant still had significant problems with his left shoulder, marked weakness, inability to abduct, and inability to use his upper extremity effectively. (CX 53, p.1).

(6) Deposition of Dr. Kinnett

Claimant noticed the deposition of Dr. Kinnett on December 4, 2001. (CX 55, p.1). Dr. Kinnett stated that Claimant's C5-6 discetomy and arthrodesis stemming from his 1995 injury had completely resolved prior to his 1997 workplace accident. *Id*. at 19. Dr. Kinnett's impression was that the 1997 injury was a possible cervical radiculopathy. *Id*. at 21-22. The symptoms Claimant expressed led Dr. Kinnett to believe that they were due to cervical disc disease and the aggravation of that disease by Claimant's activities. *Id*. at 23.

From October 17, 1997, to November 19, 2001, Dr. Kinnett summarized Claimant's condition as "recurrent exacerbations and resolution of his cervical complaints." (CX 55, p. 26). Claimant's symptoms were consistent with upper extremity cervical radiculopathy, compression neuropathies of both upper extremities, and impingement syndrome with rotator cuff tendinitis. *Id*. at 26-27.

Dr. Kinnett would limit Claimant's ability to work by prohibiting him from undertaking activities that would "load the cervical spine such as lifting with the upper extremities or precarious positions of the head or using the head as a device to apply force either supporting or lifting objects." (CX 55, p. 28). Additionally, Dr. Kinnett would restricted Claimant's activities in regards to his shoulder to avoid any activity that would accentuate his symptoms and further damage his rotator cuff. *Id*. Specific restriction could more easily be defined if Claimant underwent an MRI and additional data was obtained. *Id*. Dr. Kinnett could not predict the need for surgery in the future until a new MRI was conducted. *Id*. at 29. Claimant would be a candidate for treatment if his symptoms related to cervical disc disease began to interfere with his activities of daily living. *Id*. at 29-30. In the future, Claimant is a candidate for neck and cervical surgery. *Id*. at 30.

On cross examination, Dr. Kinnett acknowledged that Claimant had some cervical disc disease prior to his 1997 workplace accident. (CX 55, p. 34). Also, Dr. Kinnett stated that a person with cervical disc disease could have waxing and waning pain without an antecedent or traumatic event. *Id*. at 42. Dr. Kinnett further stated that the 1997 injury to Claimant's cervical spine was an accentuation of the pre-existing disease. *Id*. at 43. In regards to an earlier treatment note that Claimant had resolving cervical disc

disease, Dr. Kinnett related that an appearance of a complete resolution could have been merely an interlude in a continuing course, and he could not distinguish when a cervical disc disease had resolved and when symptoms are a continuum of the same injury. *Id*. at 43.

Dr. Kinnett did state, however, that Claimant's activities on September 8, 1997, could have aggravated any prior cervical problems that Claimant had prior to that date. (CX 55, p. 45). Claimant was a candidate for surgery, according to Dr. Kinnett's treatment notes, as of March 1, 1999. *Id*. Dr. Kinnett could not say, however, that the cervical problems that Claimant was having in November 2001 were the same problems related to his 1997 injury. *Id*.

(7) Records of Head Start

Documents from Gulf Coast Community Action Agency - Head Start reveal that Claimant worked for Head Start during the time period that he was injured from his 1995 accident. (EX 12, p. 1). Indeed, wage records reflect that Claimant began working for Head Start on December 23, 1992 to December 12, 1997. *Id*. at 3-6. The chief financial officer for Head Start, however, authored a letter dated May 1, 1998, relating that Claimant had never been an employee of that agency. *Id*. at 7. Numerous work invoices for air, refrigeration and heating services, demonstrate that Claimant sent the invoices to Head Start, but the logo on the invoices reflect a independently owned business with an address and telephone number different than that of Head Start.

(8) Deposition of Mike Wren

Employer noticed the deposition of Mr. Wren, the vice president of Employer, on April 6, 1998, in relation to Claimant's civil suit against Employer and Local 1303. (EX 19, p.1, 4). Mr. Wren related that Claimant came to see him with a return to work slip in January of 1997 wanting to return to work for Chiquita as a mechanic. *Id*. at 12. Mr. Wren responded that there were no job openings and recommended that he submit his card to the Local for employment. *Id*. at 13. When asked why Claimant was not hired for any job in January 1997, Mr. Wren responded that he didn't have a clue. *Id*. at 21. Hiring and firing equipment drivers is entirely within the discretion fo Mr. Wren's superintendent, Mr. Parker. *Id*. at 25. After receiving work restriction issued by Dr. Kinnett in September 1997, Mr. Wren determined that there were no light duty positions available that would fit Claimant's work restriction. *Id*. at 30.

(9) Federal Court Decisions

Claimant filed a civil action against Employer, Local 1303, and Donald Evans who was the president of Local 1303. (EX 15, p.1). In a written decision, dated January 19, 1999, the District Court for the Southern District of Mississippi determined that Claimant failed to show a disability within the meaning of the ADA and failed to show a *prima facie* case of discrimination. *Id*. at 27. Additionally, the court denied Claimant's fair representation claim since it was barred by prescription. *Id*. This decision was affirmed by the Fifth Circuit Court of Appeals. (EX 20, p. 2).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he was injured at work in the course and scope of his employment satisfying his *prima facie* burden and entitling him to a presumption that his harm was caused by his employment. Claimant's work-related injury on September 8, 1997, aggravated his pre-existing conditions, stemming from numerous pre-employment injuries, and the Employer is liable for the full extent of Claimant's resultant disability. Claimant alleges that he gave timely notice of injury under the Act in that he took work restrictions, issued by Dr. Kinnett, to Employer on September 19, 1997, and Dr. Kinnett's report, relating the injury to Claimant's employment was given to Employer as part of a discovery request in Claimant's discrimination suit against Employer. Alternatively, Claimant asserts that these two facts gave Employer actual knowledge, excusing the requirement for a written notice, and that failure to give notice should be excused because Employer failed to properly designate and publish the procedure to give notice. Furthermore, Claimant contends that since Employer should have had notice of Claimant's injury on September 19, 1997, its filing of the First Report of Injury, LS-202, on June 1, 1998, tolled the prescriptive period for filing a claim, making Claimant's filing with the District Director on October 3, 1998, timely.

Claimant also contents that Employer should be liable for medical treatment under Section 7 of the Act, and that he has not reached maximum medical improvement, in part, because he is still a candidate for surgery. Since Employer did not make his former job available, and such work is unsuitable for Claimant, and considering the fact that Claimant has not reached maximum medical improvement, Claimant should be considered temporarily totally disabled under Section 8(e) from the date of the accident and continuing. Although Claimant has some limited ability to perform air-conditioning and refrigeration work, Claimant contends that employer failed to show suitable alternative employment because Employers' vocational expert had not done the actual phone inquires, and Dr. Kinnett's additional work restrictions, referencing activities that would overload the cervical spine, were not adequately addressed by that expert. Under Section 10 of the Act, Claimant contends that his average weekly wage should be calculated according to Section (c), or $360.89 per week. Finally, Claimant contends that he is entitled to interest on all past due compensation, a penalty for Employer's failure to file a LS-202 in a timely fashion and attorney fees and costs.

Employer contends that Claimant has failed to establish that an injury occurred that would entitle Claimant to invoke the Section 20 presumption of causation. Specifically, Employer contends that Claimant is not a credible witness and no proof or evidence exists to substantiate Claimant's allegations of a work-place injury. Considering the circumstances surrounding Claimant's return to work, his litigious nature, his prior injury, and his failure to give a timely notice of injury, Claimant has failed to establish a *prima facie* case. Alternatively, Employer contends that it submitted substantial evidence to rebut the presumption and that the record as a whole does not support a causal relationship.

Employer also asserts that it did not receive timely notice of Claimant's injury and that it was prejudiced by the long delay in receiving notice under Section 12. Likewise, Employer asserts that the claim for compensation was filed more than a year after Claimant became aware of the injury, making it untimely under Section 13. Assuming that Claimant was injured on September 8, 1997, Employer asserts that such an injury was only a temporary aggravation of his previous condition, having reached maximum medical improvement by September 17, 1997. Employer contends that the work restrictions Dr. Kinnett issued Claimant on September 17, 1997, are the same restrictions Claimant should have gotten when Dr. Kinnett released him to return to work in January 1997, thus, Claimant suffered no permanent disability. Alternatively, Employer asserts that Claimant suffered no loss of wage earning capacity based on his contract for air conditioning and refrigeration work, and regardless, Employer established suitable alternative employment. Additionally, Employer argues that it is not liable for any medical treatment under Section 7 of the Act because Claimant has not sought approval or authorization for such treatment. Employer calculates Claimants average weekly wage under Section 10(c) as $336.00 per week.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998) *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law, and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Here, I do find that Claimant is an incredible witness. First, in a decision filed on January 19, 1999, a United States District Judge reported that Claimant asserted total and permanent disability from pursuing his career as a Longshoremen as a result of injuries he sustained in an automobile accident. (EX 15, p. 5). In contrast, Claimant was released by his treating physician in January 1997 without restrictions and Claimant took the job of loading the chicken boat on his own volition, making his earlier statement of total and permanent disability false. Additionally, Claimant continued to operate his air-conditioning and refrigeration business despite his assertions of permanent and total disability.

Second, at the hearing Claimant testified that he did not perform any air conditioning work around the time of his alleged work-place accident on September 8, 1997. (Tr. 171-72) In fact, Claimant's work invoices reflect that on September 11, 1997, he replaced a coil, and installed a dryer. (EX 12, p. 110). On September 21, 1997 Claimant installed a four-ton air-conditioning unit and a four-ton coil. *Id*. at 116.

Third, I note that Claimant gave numerous conflicting statements concerning his knowledge of the alleged work-related injury. When the circumstances were expedient to have knowledge soon after September 8, 1997, such as when considering issues of causation, Claimant argues for an earlier date for knowledge of the accident and the onset of symptoms. When arguing that he filed a timely notice or a timely claim, however, Claimant asserts that he had no knowledge that his injury was connected to his work until told so by his doctor in May 1998.

Fourth, in a deposition taken on November 25, 1997, Claimant flatly denied ever having been injured as a Longshoreman. (EX 17, p. 29). Fifth, Claimant has a suspect history for abusing the legal process. On June 30, 1986, Dr. Smith, who treated Claimant for headaches, noted that Claimant's headaches were uncommonly frequent when he was supposed work on the week-ends and that he was "potentially a patient abusive of the system." (EX 9, p. 59). Likewise, on March 12, 1986, Dr. Smith counseled Claimant on the phenomena of compensation neurosis. (EX 9, p. 62). Dr. Reed noted that Claimant had a tendency to "hang on." (EX 10, p. 18-19). All of these factors, combined with my observation of Claimant's demeanor at trial, contribute to my finding that Claimant is not a credible witness.

C. Notice and Filing of Claim

Under 33 U.S.C. § 912(a) (2000), notice of an injury must be given within thirty days after the injury, or, within thirty days of when the employee should have been aware of a relationship between the injury and the employment. In occupational disease cases, notice must be given within one year after the employee became aware, should have been aware, of a relationship between the employment, the disease and the disability. *Id*. Failure to give such notice may be excused when the employer has actual knowledge of the injury, when there is no prejudice to the employer or carrier, or when other circumstances are present that justify excusing the failure to timely file notice. 33 U.S.C. § 912(d) (2001). These notice provisions must be read in context with the limitations set forth in Section 13 relating to the filing of claims. For a traumatic injury, a claim must be filed within one year of the injury, but, this prescriptive period does not begin to run until the employee is aware, or should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 913(a) (2000). For occupational disease claims, an employee has two years once the employee is aware, or should have been aware, of a relationship between the employment, the disease and the disability. 33 U.S.C. § 912(b)(2) (2000). Failure to file a claim timely is not a bar to suit unless objection to such failure is made at the first hearing[5] in which all parties are given reasonable notice and an opportunity to be heard. 33 U.S.C. § 913(b)(1) (2000). Timeliness of a claim is presumed under Section 20(b), and the burden to show untimeliness is on the employer. *Avondale*

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[5] In its Notice of Controversion, dated June 6, 1998, Employer raised Section 12 as a defense and reserved the right to amend its reasons for controversion. (CX 39). On May 16, 2001, Employer amended its Notice of Controversion to include Section 13. (CX 43). Also, in its LS-18 pre-hearing statement Employer raised Section 13 as a defense. (EX 2). Accordingly, I find that Employer timely raise the issue that Claimant's suit was not timely filed.

Shipyards, Inc. v. Vinson, 623 F.2d 1117 (5th Cir. 1981); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 143 (1989).

C(1) Traumatic Injury or Occupational Illness

A traumatic injury is distinct from an occupational illness in that the occurrence for a traumatic injury is discernable whereas an occupational illness manifests over time without a precise onset date. *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5, 9 (1996). The Second Circuit has defined occupational disease as requiring the satisfaction of three elements: 1) the employee must suffer from a disease (as opposed to a traumatic injury); 2) hazardous conditions surrounding the employment must be of such nature as to cause the disease (coal dust, asbestos, radiation, etc.); and 3) the conditions must be peculiar to the specific occupation, as opposed to employment in general. *Grain Handling v. Sweeney*, 102 F.2d 464, 465 (2nd Cir. 1939); *accord, Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir. 1997). Accordingly, as Claimant's alleged injury was brought on by physical labor, a condition hardly specific to his occupation as a longshoreman, Claimant cannot have suffered an occupational disease and is accorded the notice and filing deadlines associated with traumatic injuries.

C(2) Section 12's Aware or Should Have Been Aware Standard

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty days after the date of the injury or death, or within thirty days after the "employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury or death and the employment." 33 U.S.C. § 912(a) (2001). Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732-33 (9th Cir. 1985), *on remand*, 18 BRBS 112, 114 (1986); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20, 22-23 (1986). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir. 1979); *Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232, 235 (1986).

Here, the facts relate that Claimant had actual awareness, and if not, he should have been aware of the relationship between the injury and employment no later than September 17, 1997.

> Q . . . . [Just so we're clear, you were aware prior to that time [May 13, 1998] you're saying, that you did have a work injury?
>
> THE WITNESS: . . . . I told - - I was aware that I needed medical help on May 13. Prior to - - before May 13, the doctor was giving me medicine telling me that the medicine is supposed to work.
>
> I knew I had gotten hurt on the pier, but I couldn't come and tell these

people, I want Workmen's Comp from you, and try to get money from them or whatever, medical help from them, and the doctor wasn't through with telling me -- all he was giving me is medicine.

If the medicine had worked, we wouldn't be here now. But the medicine didn't work. And he told me I was going to need a MRI. And that's when it came plain and clear to me that I was going [to] need help from (sic) the injury that I had on September 8.

JUDGE KENNINGTON: In other words, are you telling me that on this date in May, May [13, 1998] . . . . you realized that the medicine the doctor was giving you wasn't going to cure your problem?

THE WITNESS: That's exactly what the doctor told me, that the medicine that he was giving me -- because when I first went to him, he said, You have aggravated your disease, and this medicine should correct it.

After the medicine didn't correct it, that's when I -- he told me I was going to need an MRI. That's when I knew, then, that I was going to really need medical help from the Employer. That was on May 13, when I went to the doctor.

JUDGE KENNINGTON: Well, did you realize before that time that you had been injured on the job?

THE WITNESS: I realized that, but I didn't know that I was going to need medical help, because the medicine that the doctor was giving me was supposed to take care of the inflammation or whatever it was supposed to do.

And when it got to the point where the medicine didn't do what the doctor said it was going to do, the doctor told me, You need to get in touch with your employer because you need help. . . .

And that's the same thing he told me about the aggravation, when I had it in '97. He told me, We're giving you this medicine, and hopefully it'll correct it. If this medicine [doesn't] correct it, we'll have to go further, so I needed help.

Q So Mr. Marsh, did you or did you not know on September 17, [1997] when you went to see Dr. Kinnett, did you or did you not know that you had a work-related injury?

A . . . . Dr. Kinnett told me I had aggravated my disease from the work I had done. . . . . He said, It's not a bran new injury, but you've aggravated your disease.

So I wasn't under the impression he was under the impression that I could go to the company and say, I'm injured, I done hurt myself, I've had an injury that was going to be on me until May 13, when he told me, The injury, the aggravation

that you had, is a result to what you've got now.

(Tr. 186-190).

Claimant further testified that when he ended the work day on September 8, 1997, he did not think that he had sustained a injury. (Tr. 193). He only contacted Dr. Kinnett because the stiffness in his neck did not resolve. (Tr. 193). When Dr. Kinnett related the problems to an aggravation of Claimant's condition, Claimant stated that he was unaware that he could obtain relief for aggravating his disease. (Tr. 193). Indeed, in a deposition in an unrelated manner Claimant testified that he had he never had any type of longshore injury. (Tr. 197; EX 17, p.29). When Claimant visited with Dr. Reed on September 16, 1997, however, Claimant stated that he was depressed because he had lost his job due to a herniated disc in his neck, a statement Claimant alleges references his September 8, 1997 injury, but a statement Dr. Reed understood meant his 1995 motor vehicle accident. (Tr. 231-238; EX 9, p.25). Even though Dr. Reed stated that Claimant never told him about his September 8, 1997 workplace injury, (EX 10, p.11), Claimant stated that he related to Dr. Reed that Employer would not hire him anymore because of his neck, and whether Dr. Reed took that as the 1995 or the 1997 injury Claimant could not say. (Tr. 238). Additionally, Claimant took the work restriction issued by Dr. Kinnett to Employer on September 19, 1997.

Accordingly, assuming for the time being, that Claimant suffered a traumatic injury on September 8, 1997, by his own testimony, he fairly related his current physical impairment to September 8, 1997, when speaking with Dr. Reed on September 16, 1997, and related the fact of injury to Dr. Kinnett on September 17, 1997. Also on September 17, 1997, Dr. Kinnett issued work restrictions limiting Claimant's lifting to twenty-pounds with no overhead work and made a diagnosis of a possible cervical radiculopathy. The fact that Claimant suffered from a mistake in law - that he could claim compensation for aggravating a pre-existing injury is unavailing. *See Jones v. Newport News Shipbuilding & Dry Dock Co.*, 5 BRBS 323, 331 (1977) (finding that a mistake of law is no excuse), *aff'd*, 573 F.2d 167 (4th Cir. 1978); 3 Larson 126.09(3) (1998)(stating that a mistake in law is no excuse for filing a late compensation claim). Accordingly, Claimant became aware that he suffered a work related injury no later than September 17, 1997, and the prescriptive period for Section 12 began running as of September 18, 1997.

C(3) Exceptions to Notice Requirement

Claimant's notice to Employer on May 29, 1998, that he suffered a work place injury on September 8, 1997, does not fall within the thirty day prescriptive period of Section 12(a). The notice requirement serves to alert the Employer of an impending suit, protect against fraudulent claims, and encourage prompt investigation. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997). *See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613, 102 S. Ct. 1312, 1216-17, 71 L. Ed. 495 (1982)(stating that the notice requirement serves to appraise the employer of the allegations and helps to confine the issues to be tried and litigated). Under Section 12(d) there are three exceptions that excuse an untimely filed notice: when the employer has knowledge of the injury, when the employer is not prejudiced by the late filed notice, and when there are

exigent circumstances that reasonably excuse the failure to give timely notice. 33 U.S.C. § 933(d) (2001).

C(3)(a) Knowledge Under Section 12(d)(1)

Under Section 12(d)(1), a failure to give timely notice to the employer is excused when the employer has knowledge of the injury. 33 U.S.C. § 912(d)(1) (2001). Section 20(b) creates a presumption that, in the absence of substantial evidence to the contrary, employer had knowledge of the injury and was not prejudiced by claimant's failure to give notice. *Forlong v. American Securities & Trust Co.*, 21 BRBS 155, 159 (1988), citing *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982). Generally, for an employer to have knowledge of the injury, it must know of the injury and its relationship to the employee's work. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 151 (3rd Cir. 1975). Such knowledge may be imputed to the employer when the employer knew that the employee suffered an injury and the surrounding facts and circumstances would lead a reasonable person to believe that the injury may be work related so that a further investigation is warranted. *Addison v. Ryan-Walsh Stevedoring Company*, 22 BRBS 32, 35 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 1, 3 (1985), *on recons.*, 18 BRBS 151 (1986)(applying exceptions in Section 12(d) in the disjunctive). The Board has construed the Section 12(d)(1) exception in a narrow fashion. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66, 71 (1986)(stating that mere knowledge of an accident at work does not equal actual knowledge of an injury giving rise to compensation liability that the employer would likely investigate); *Perkins v. Marine Terminals, Corp.*, 16 BRBS 84, 89 (1984). The time for "knowledge" within the meaning of Section 12(d)(1) refers to the same time period as for giving effective notice, i.e., within the thirty days provided for in Section 12(a). *Gardner v. Railco Multi Construction Co.*, 19 BRBS 238, 241 (1987), *vacated*, 902 F.2d 71 (D.C. Cir. 1990)(vacated on issue of coverage in relation to exposure or manifestation tests).

Claimant contends that after his work-place injury on September 8, 1997, he did not return to work and between that time and his doctor's appointment on September 17, 1997, no one contacted him to inquire why he had not returned to work. Also, after Dr. Kinnett issued Claimant's work restrictions on September 17, 1997, Claimant took Dr. Kinnett's letter to a representative of Employer and on September 19, 1997, Mr. Wren, vice president for Employer, responded that Employer did not have any employment that Claimant was capable of performing within those restrictions. (CX 14; CX 35). Additionally, on December 19, 1997, as part of a discovery request in Claimant's discrimination case against Employer, Claimant turned over a complete copy of medical records from Dr. Kinnett, which contained information linking his September 8, 1997 injuries with his work on the chicken boat. Claimant contends that these two facts establish that the Employer had knowledge of his injuries and that a late filed notice should be excused under Section 12(d)(1).

In *Gardner*, 19 BRBS at 240-41, the Board determined that a failure to give notice within thirty-days as required under Section 12(a) was not excused under Section 12(d)(1) when the injured worker learned that he had suffered a hearing loss on September 16, 1982, and an ALJ determined that Employer had knowledge on January 3, 1983, without a showing of any prejudice. Even after applying the Section

20(b) presumption of timely notice, the exception in Section 12(d)(1) would not apply because, as a matter of law, the employer did not have any facts showing that an injury occurred within thirty days of when the injured worker became aware of the injury. *Id*. at 241. The fact that knowledge was established in January was too late to fit within the exception of Section 12(d)(1). *Id*.

In *Addison*, 22 BRBS at 35, the Board concluded that the "employer's knowledge of [a] work-related accident was not sufficient to charge employer with knowledge of a work related back injury." The claimant, Addison, had sustained a "bruised chest" at work and filed a timely Notice of Injury under Section 12(a), giving employer actual knowledge that he had suffered an injury at work. *Id*. at 34. The notice, however, was insufficient to provide the employer with knowledge of a back injury. *Id*. Reasoning that the employer must be aware of the actual injury sustained the Board determined that mere notification of an accident is insufficient to justify a late filed notice under Section 12(d)(1). *Id*. at 35.

Here, Claimant squarely related his impairment to a work related accident on September 17, 1997, when he saw Dr. Kinnett. (CX 12, p. 5). Thus, to invoke entitlement to the Section 12(d)(1) exception, Claimant must show that Employer had knowledge within thirty days of that event. Accordingly, discovery responses, turned over in December, would not fall within the thirty day time limitation. The only other evidence Claimant produced to show that Employer had knowledge within the time frame provided for in Section 12(a), is the statement of work restrictions which was given to Mr. Wren.[6] That statement, however, only provides that Claimant is not to perform any lifting over twenty pounds with both hands. It does not mention that claimant suffered a work-related accident. Accordingly, I find that Claimant is not entitled to the Section 12(d)(1) exception to Section 12(a) because Employer was not provided with sufficient facts of an injury which would cause a reasonable person to conduct a further investigation due to the possibility of compensation liability.

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[6] At the hearing the Claimant testified:

Judge Kennington:	Did you tell anyone at the company about why you had these restrictions? . . .
Witness:	No. I didn't talk to nobody (sic) at the - - I sent them a letter. . . . I was talking to - - I was going through the president of my Local.
Judge Kennington:	Did you tell the president of the Local why you had the restrictions?
Witness:	No I didn't. He didn't - - we were talking through registered letters.

(Tr. 138).

C(3)(b) Prejudice Under Section 12(d)(2)

Section 12(d)(2) provides that a failure to give a timely notice is excused when the Employer is not prejudiced by the late notice. 33 U.S.C. § 912(d)(2) (2001). Employer must provide more than conclusory statements that it was prejudiced. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989). A mere allegation of difficulty is insufficient to establish prejudice, *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988), but actual post-notice investigation is not needed. *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 1275 (9th Cir. 1997). Rather, an Employer can show prejudice by proving that it "has been unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978). An employer, however, cannot reasonably expect notice of potential liability until the facts that make the employer potentially liable are ascertained. *ITO Corp.*, 883 F.2d at 424.

In *Kashuba*, 139 F.3d at 1276, the Ninth Circuit overturned an ALJ's decision, as not based on substantial evidence, and determined that the employer was prejudiced by late notice under Section 12(b). The claimant, Kashuba, did not notify his employer "until four months after the alleged injury and nearly six weeks after Kashuba had undergone back surgery." *Id*. The Ninth Circuit reasoned that Kashuba was not a credible witness since the ALJ had cited several inconsistencies in his testimony regarding the alleged injury and its treatment. *Id*. Also, the court reasoned that if the employer had received prompt notification, it could have conducted an "investigation to determine whether the accident had even occurred and its possible relationship to Kashuba's history of back problems, pointing out that Kashuba did not disclose his 1984 spinal injury on his employment application, a fact that would have magnified the need for prompt investigation." *Id*. Late notice deprived the employer from taking part in Kashuba's medical care, avoiding subsequent injuries, and avoiding surgery. *Id*. Furthermore, the employer should have had the opportunity "to get a second opinion before Kashuba underwent surgery or at least been informed before such a major procedure." *Id*. Accordingly, the employer was prejudiced because it was deprived from being able to produce "specific and comprehensive" evidence to sever the connection between Kashuba's injury and his employment. *Id*. (citing *Parsons Corp. v. Director OWCP*, 619 F.2d 38, 41 (9th Cir. 1980)).

In *Jones Stevedoring Co.*, 133 F.3d at 689-90, the Ninth Circuit held that the employer was not prejudiced by the claimant's, Taylor's, late filed notice. After thirty years as a longshoreman, Taylor filled an EMS accident report on October 15, 1989, reporting an excessive ringing in his ears. *Id*. at 686. At a pre-scheduled doctor's appointment on October 19, 1989, Taylor was diagnosed with "bilateral, descending sensorineural hearing impairment from mild to moderate." *Id*. On June 24, 1991, a second audiogram was conducted reaffirming the earlier results. *Id*. On July 1, 1991, the employer learned for the first time that Taylor's claim was for injuries sustained while at work. *Id*. At a formal hearing, the ALJ ruled that employer was not prejudiced by the late notice. *Id*. Specifically, the ALJ determined that employer still had ample time to conduct discovery and obtain sound surveys. *Id*. at 690. Additionally, the audiograms in the record indicated that Taylor's hearing loss had not worsened or changed in any way that would prevent employer from ascertaining the extent of Taylor's injury. *Id*. This rational was approved by the Ninth Circuit. *Id*.

In *Bolden v. Ingalls Shipbuilding, Inc.*, 33 BRBS 593, 599 (1999)(ALJ), the court denied benefits finding that the employer was prejudiced. Specifically, the claimant had "received six months of medical treatment and underwent unsuccessful back surgery three months before Employer was made aware that Claimant was alleging his condition was work related." *Id*. Because of the late notice the employer was "denied the opportunity to obtain a second opinion "to assess the origin of the claimant's injury, its possible causes, and whether it was connected to the claimant's employment." *Id*.

In the instant case, Employer presented the testimony of Mr. Untereiner, the operations manager for Employer, to explain Employer's policy for reporting injuries. (Tr. 240). Mr. Untereiner testified that all employees are told at safety meetings that if they have an accident they should always report that incident before they leave the vessel. (Tr. 240). The injured worker should first go to his foreman, who then goes to the superintendent of the job, and accident report is filled out and the employee is then taken to the doctor. (Tr. 240-41). Employer has a safety personnel that investigates an accident to see why it happened and to try to prevent a reoccurrence in the future. (Tr. 254). Although the policy of Employer is to immediately report an accident before leaving the vessel, fill out a report, and take the employee to see a doctor, Mr. Untereiner stated that the procedure was different when an employee notified Employer of an injury by mail. (Tr. 257). In mail notification case, Mr. Untereiner contacts the claims department to investigate the matter. (Tr. 258). Additionally, Employer asserted that it was deprived of the opportunity of obtaining a second medical opinion immediately following Claimant's alleged accident. Employer was not made aware of the accident until Claimant had settled his third party litigation, stemming from an earlier auto accident, which necessitated his original back surgery. Because Claimant is alleging an aggravation of a pre-existing condition, Employer had an interest in joining the third party litigation and taking part in any settlement negotiations.

Claimant alleged that he experienced a stiffness in his neck during his nine-hour shift in freezing temperatures while stacking thirty-five to forty pound frozen chicken boxes. (Tr. 123-25). Claimant's work pace slowed and at lunch he related his problems to David Caldwell, a co-worker. (Tr. 125; CX 11). Attributing the stiffness to the below zero temperature, Claimant continued working and finished his nine hour shift. (Tr. 124). Claimant scheduled an appointment with Dr. Kinnett, and on September 17, 1997, Dr. Kinnett diagnosed possible cervical radiculopathy, issued work restrictions and related the injury to Claimant's work. (EX 8, p. 7). On October 15, 1997, Dr. Kinnett diagnosed impingement syndrome with rotator cuff tendinitis and resolving cervical disc disease. *Id*. at 6. By April 1, 1998, Dr. Kinnett diagnosed multi-level cervical disc disease with neural forminal stenosis. *Id*. Applying the Section 20(b) presumption of timely notice, Employer must show that it was prejudiced by these facts.

Similar to *Kashuba*, employer was prejudiced because it was deprived from being able to produce evidence to sever the connection between Claimant's injury and his employment since Employer never had the opportunity to examine Claimant following the alleged injury. The fact that Dr. Kinnett reported marked improvement in Claimant's condition around October 5, 1997, and then reported subsequent severe pain without a specific antecedent event, systemic illness or trauma, renders Claimant's contention, of a continuing impairment due to his September 8, 1997 injury, suspect. Also like *Kashuba*, I find Claimant's credibility suspect regarding the injury and can find no legitimate excuse not to notify Employer after the

September 17, 1997 doctor's appointment where Claimant became fully aware of the nature of his injury and its relation to his employment. Although Claimant has not undergone surgery and Employer still has an opportunity to participate in the course of Claimant's treatment, similar to *Bolden*, Employer was denied the opportunity to obtain a second opinion to assess how much Claimant's alleged workplace accident contributed to his current impairment and how much was due to Claimant's pre-existing condition and possible subsequent aggravations in Claimant's air-conditioning business. Unlike *Jones Stevedoring Co.*, Claimant's condition appears to have deteriorated since his workplace accident and Employer would be unable to ascertain the full extent of Claimant's workplace injury. Also, unlike *Jones Stevedoring Co.*, Employer does not have the opportunity to gain more knowledge though discovery, because the lone witness to the accident, David Caldwell, cannot be located after a diligent search. Caldwell would certainly have been available for a statement within thirty days of September 17, 1997. Also persuasive is the fact that Employer was deprived of the right to participate in the medical determinations in Claimant's tort litigation that gave rise to Claimant's original back injury. Therefore, following *Davis*, 571 F.2d at 972, Employer is unable to effectively investigate the claim to determine the nature and extent of the alleged illness or to provide medical services due to the late filed notice. Accordingly, Employer has established prejudice under Section 12(d)(2).

C(3)(c) Section 12(d)(3) Satisfactory Reasons Excusing Notice

When neither a claimant nor his physician are sure as to the relationship between the injury and the employment, a failure to give timely notice may be excused. *Jordan v. General Dynamics Corporation*, 4 BRBS 201, 205 (1976). Likewise, when a claimant does not know the identity of his employer, and cannot locate the person who hired him, late notice is excused under Section 12(d)(3). *Johnson v. Treyja, Inc.*, 5 BRBS 464, 470 (1977). A failure to realize that a right to compensation exists is not sufficient grounds to excuse a late filed notice. *Arcus v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 34, 36-37 (1983)(finding an uneducated and unsophisticated claimant's ignorance of the right to compensation and the applicable prescriptive periods was no excuse).

Here, Claimant asserts that Employer failed to properly designate and publish the name or position of the individual authorized to receive notices of injury. Employer's representative at hearing, Mr. Untereiner, who testified about Employer's procedures for reporting injuries, was not working for Employer when Claimant was injured and did not have first hand knowledge of policies and procedures in use at that time.

As noted *supra*, I find that Claimant is not a credible witness. Even if Claimant did not personally know the proper procedure for reporting an injury, Claimant never told his foreman or other supervisor at work that he was injured on the job. No evidence in the record suggests that Claimant did not have the mental faculties necessary to understand that he should tell the Employer when he is injured at work. Accordingly, I find that Claimant is not entitled to the Section 12(d)(3) exception to filing a timely notice. Therefore, Claimant's request for benefits under the Act is DENIED for a failure to timely notify Employer that he was injured at work.

Should the Board determine that notice is timely, however, I shall decide the remaining issues in the case.

V. ALTERNATIVE FINDINGS

A. Section 913's Aware or "Should Have Been Aware" Standard

The limitations period does not begin to run under Section 13 until the employee is aware of the "full character, extent and impact of the harm done to him." *Abel v. Director, OWCP*, 932 F.2d 819, 821 (9th Cir. 1991)(quotation omitted); *Duluth, Missabe & Iron Range Railway Co. v. Director, OWCP*, 43 F.3d 1206, 1208 (8th Cir. 1994)(same). *See also Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 18 (5th Cir. 1997)(stating that prescription runs when the employee knows, or should know, that his condition "interferes with his employment by impairing his capacity to work, and its causal connection with his employment."); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134 (6th Cir. 1996)(stating that time begins to run only after the "employee becomes or should become aware that the work-related injury will impair the employee's earning capacity."); *Bath Iron Works v. Galen*, 605 F.2d 583 (1st Cir. 1979)(using same analysis for Section 912). "Experiencing pain after an accident, particularly when that pain does not prevent the employee from working, does not put the employee on notice of a likely impairment of long term earning capacity. *Thompson*, 82 F.3d at 135. Section 13 serves a purpose of repose that Section 12 does not in that Section 13 settles financial disputes within a specified period of time. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997).

Here, Claimant filed his first claim for compensation on October 3, 1998, for an injury that occurred on September 8, 1997. (CX 42). As discussed *supra*, Claimant was aware, or should have been aware of a relationship between his injury and employment on September 17, 1997, when he related the fact of injury to Dr. Kinnett, and Dr. Kinnett associated the injury with Claimant's condition and issued work restrictions. Thus, on September 17, 1998, Claimant was aware of the "full character, extent, and impact of the harm done to him," *Able v. Director, OWCP*, 932 F.2d 819, 821 (9th Cir. 1991), and had one year from that date to file a claim under the Act. 33 U.S.C. § 913 (2001).

A(1) May 28, 1998, Letter as Constituting a "Claim" Under Section 13

Under Section 13, a claim for compensation "shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred." 33 U.S.C. § 913 (a) (2001). The "shall" language in Section 13(a), however, is not mandatory, and "any writing may suffice as a claim as long as it discloses an intention to assert a right to compensation under the Act." *Grant v. Interocean Stevedoring Inc.*, 22 BRBS 294, 297-98 (1989) (finding a third party suit does not constitute a claim withing the meaning of Section 13(a)). *See also Walker v. Rothschild International Stevedoring Co.*, 526 F.2d 1137, 1139 (9th Cir. 1975)(stating that a form filed by claimant's physician constituted a timely filing of a claim by the claimant under Section 13(a)); *Peterson v. Washington Metropolitan Area Transit Authority*, 17 BRBS 114, 115-16 (1984)(finding that a physician's report indicating the possibility of a

continuing disability may satisfy the requirements of Section 13(a) reasoning that nothing in the Act discusses the form in which a claim may be filed, thus, any notice that reasonably makes a claim for compensation is sufficient); *Johnson v. U.S. Cost Guard Exchange*, 33 BRBS 492, 495 (1999)(ALJ)(finding that a DOL form containing an employee's notes concerning a telephone call claimant made to OWCP constituted a claim under the Act).

Similarly, there is no rigid requirement that a claim be filed with the deputy commissioner as filing a claim with the employer will suffice. *Downey v. General Dynamics Corp.*, 22 BRBS 203, 205 (1989). The "purpose behind the reporting requirements of Section 13 is to ensure that the employer will receive prompt written notification of the claim through forwarding of the claim to employer from the deputy commissioner." *Id*; citing *Paquin v. General Dynamics/Electric Boat Division*, 4 BRBS 383 (1976). *C.f.* 20 C.F.R. 702.221 (2001)(stating that claims for compensation shall be in writing and filed with the district director containing the social security number of the injured employee); *Lee v. Puerto Rico Marine*, 31 BRBS 192, 194 (1996)(ALJ)(stating the claim must be filed with the district director).

Here, Claimant wrote to Employer on May 28, 1998, stating:

> I Kenneth Marsh, Jr. was injured on 09/08/97 while I was working on the chicken boat. I am requesting Longshoremen's and Harbor Workers' Compensation.
>
> Sincerely,
> /s/ Kenneth Marsh

(CX 36).

Accordingly, Employer received written notification of a claim within the one year period of repose provided for in Section 13. Although Claimant did not follow the letter of the law as provided for in Section 13(a) and 20 C.F.R. § 702.221 until October 3, 1998, well after a year from when Claimant should have had knowledge of the relationship between the injury, his disability and his employment, it would make little sense for Claimant to notify the deputy director first so that the deputy director could timely notify Employer.[7] Accordingly, I find that Claimant has timely file a claim for compensation under the Act.

B. Causation

An employee is aided by the Section 20 presumption that the claim comes within the provisions of the Act unless there is substantial evidence to the contrary. 33 U.S.C. § 920 (2000). All factual doubts must be resolved in favor of the claimant. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366,

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[7] Because I find that Claimant's March 28, 1998 letter constituted a filed claim under the act, there is no need to address the issue of tolling the prescriptive period under Section 13 in the context of Section 33(a) & (f).

371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994). The Section 20(a) presumptions were left untouched by *Greenwich Colleries*. *Id* at 280. Thus, the Section 20(a) presumption applies in determining whether working conditions caused a claimant's injuries. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 118 (1995).

Before invoking the Section 20(a) presumption, a claimant must first establish a *prima facie* case by showing that he suffered some harm and that working conditions existed which could have caused the harm. *O'Kelly v. Dep't of the Army*, 34 BRBS 39, 40 (2000). Once a claimant has established a *prima facie* case, the employer/carrier must produce evidence that the claim does not fall under the provisions of the Act, and once defendant meets this burden the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer/carrier is the burden of production only. *Id*. at 817.

B(1) Establishing the Section 20(a) Presumption

Section 20 of the Longshore Act provides: "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between the work and the harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2nd Cir. 2001); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment.

B(1)(a) Existence of Physical Harm or Pain

Claimant clearly established that he suffers from a harm. On September 17, 1997, Claimant went to Dr. Kinnett complaining of stiffness in the posterior cervical area, numbness in the fingers of the left hand and pain in the trapezius area after stacking boxes weighing thirty to sixty pounds in the hull of a ship for nine hours. (EX 8, p. 7). A x-ray revealed solid arthrodesis at C5-6, minimal narrowing at C4-5 and C6-

7 disc levels with some evidence of neural foraminal stenosis. *Id*. Dr. Kinnett diagnoses was a possible cervical radiculopathy and issued work restriction limiting Claimant to lifting twenty pounds with no overhead work. *Id*.

Dr. Kinnett remarked that Claimant's cervical complaints had resolved "nicely" by October 15, 1997, but without a specific antecedent event, Claimant experienced severe pain in his right shoulder. (CX 8, p. 6). Dr. Kinnett diagnosed the problem as impingement syndrome with rotator cuff tendinitis and resolving cervical disc disease. *Id*. Because of the new symptoms Dr. Kinnett extended Claimant's work restrictions and recommended that Claimant undergo training for a new vocation. *Id*. On a April 1, 1998, return visit, Dr. Kinnett detected solid, stable anterior cervical anthrodesis and multilevel disc disease with neural foraminal stenosis as evidenced by "marked narrowing of the disc spaces at two levels above [C6-7]." *Id*.

An MRI performed on November 5, 1998, showed cervical disc disease at 4-5, solid union at 5-6 and a herniated disc at 6-7. (EX 8, p. 6). An EMG study performed on November 16, 1998, was consistent with bilateral early ulnar neuropathy as well as C4-5, 5-6 radiculopathy and Dr. Kinnett opined that Claimant may need more surgical intervention in the future. *Id*. at 4. By September 20, 1999, however, Claimant elected to continue with cervical precautions and at follow up visit on September 20, 2000, Claimant continued to complain of limitation in his range of motion. *Id*. at 3. A x-ray showed evidence of cervical disc disease at 4-5 and 6-7. *Id*. On October 9, 2000, Claimant related that he had trouble backing up his automobile because he was unable to turn his body to see out of the back windshield. *Id*. at 2. On Claimant's last documented treatment date, November 19, 2001, Dr. Kinnett remarked that Claimant still had significant problems with his left shoulder, marked weakness, inability to abduct, and inability to use his upper extremity effectively. (CX 53, p.1). Accordingly, Claimant established the first element of a *prima facie* case for compensation because he suffers from possible cervical radiculopathy, resolving cervical disc disease, rotator cuff tendinitis, impingement syndrome, bilateral ulnar neuropathy.

B(1)(b) Establishing That an Accident Occurred in the Course of Employment, or That Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that condition existed at work that could have caused the harm. *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record). For a traumatic injury case, the claimant must show a specific traumatic event, more than just working conditions that required repetitive bending,

stooping, climbing, or crawling. *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997)(finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are treated as traumatic injuries); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989)(finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease). Conditions that are due to congenital and degenerative factors do not constitute a compensable injury. *Lennon v,. Waterfront Transport*, 20 F.3d 658, 662 (5th Cir. 1994); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60 (5th Cir. 1980). Thus, a claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation

In *Bolden v. G.A.T.X. Terminals, Corp.*, 30 BRBS 71, 72-73 (1996), the Board affirmed a denial of benefits when the ALJ determined that the claimant was not a credible witness and negated the claimant's contentions that he suffered a work related accident. Specifically, the claimant related his injury to a specific traumatic event, but the ALJ noted: 1) the claimant was confused over the date of the incident; 2) a physician remarked that the claimant had experienced pain two weeks prior to the alleged accident; 3) neither the clamant nor his physician related the pain to the claimant's work during or soon after the alleged event occurred; and 4) the claimant failed to report the injury to his employer promptly. *Id*. at 72. Similarly, the ALJ discredited the testimony of the claimant's co-workers and wife because their statements concerning the claimant's physical condition did not establish the date of the alleged traumatic event. *Id*. Finally, the ALJ noted that no physician, outside of those who took the claimant's version of events at face value, could establish that a specific event cause the claimant's injuries. *Id*. at 72-73. Accordingly, the claimant in *Bolden* failed to establish the second prong of the *prima facie* case because he failed to establish that a traumatic event, or conditions that existed at work, could have caused his harm. *Id*. at 73.

Similar to *Bolden*, Claimant failed to establish that an event occurred, or that conditions at work were such that caused Claimant's physical impairments. As noted *supra*, I do not find that Claimant made a credible witness. As such, his uncorroborated testimony is insufficient to establish entitlement to a *prima facie* case and the Section 20(a) presumption of causation. Thus, Claimant must establish by objective evidence that some event occurred or condition existed on September 8, 1997, that caused his harm. Here, as in *Bolden*, only the statements of Dr. Kinnett relate Claimant's injury to his work and that statement of causation is based on the uncorroborated statements that Claimant made to Dr. Kinnett.[8] In his deposition, Dr. Kinnett testified that the history a patient gives him is important for establishing causation, but causation can also be established based on physical data and objective studies. (CX 55, p. 36). The objective physical and diagnostic studies in this case reveal that Claimant had cervical disc disease, and the symptoms from that disease wax and wane. (CX 55, p. 42). Claimant was diagnosed with cervical

[8] As noted *supra*, Claimant attempted to introduce the affidavit of a co-worker, David Caldwell, to prove causation. Because David Caldwell was unavailable at trial and in the months following, I rejected his affidavit from evidence because I found that it was untrustworthy under 29 C.F.R. § 18.804(b)(5) (2001).

problems in 1995 as part of his problems stemming from his motor vehicle accident. (EX 8, p. 10). Indeed, all of the objective medical testing after September 8, 1997, can be fairly correlated with Claimant's physical impairments prior to that date. Thus, the objective medical evidence is, at best, in equivalent. With symptoms that wax and wane, Dr. Kinnett indicated that he would be unable to determine what symptoms were due to natural progression of an earlier cervical problem and what symptoms were due to an alleged aggravation at work. (EX 55, p. 42-43).

Other factors also cast suspicion on whether an event occurred, or conditions existed at work on September 8, 1997, to cause Claimant's harm. For instance, Claimant failed to promptly notify Employer of his injury and never told his supervisor on the day that he experienced the pain. Also, the underlying relationship between Claimant, Employer and Local 1303 appears to be acrimonious. When Claimant was unable to obtain a high paying position with Employer as a mechanic, Claimant filed an ADA suit. Likewise, Claimant filed an EEOC charge against Local 1303. On the one day that the Local hired him out to do Longshoring work as a chicken thrower, a job Claimant was attempting to avoid by becoming a mechanic, Claimant alleged an injury. An injury which, on September 27, 1997, and again on November 25, 1997, Claimant flatly denied having ever occurred. Accordingly, after discrediting Claimant's testimony, I find no credible evidence to support a finding that an event occurred or conditions existed at work, that gave rise to a traumatic injury and Claimant has failed to establish a prima facie case of causation under the presumption in Section 20(a). Claimant's entitlement to benefits under the Act is therefore DENIED.

Should the Board determine that Claimant met the burden of establishing a *prima facie* case, I will address the remaining issues in the case.

B(2) Rebutting the Section 20(a) Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*, 194 F.23d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

Here, Employer presented substantial evidence to show that Claimant's injury was not work related. Specifically, Employer states that Claimant has a long history of back problems prior to his alleged September 8, 1997 work place injury. (EX 8; EX 9). Dr. Kinnett acknowledged that Claimant had some cervical disc disease prior to his 1997 workplace accident. (CX 55, p. 34). Also, Dr. Kinnett stated that a person with cervical disc disease could have waxing and waning pain without an antecedent or traumatic event. *Id*. at 42. In regards to an earlier treatment note that Claimant had resolving cervical disc disease, Dr. Kinnett related that an appearance of a complete resolution could have been merely an interlude in a continuing course and he could not distinguish when a cervical disc disease had resolved and when symptoms are a continuum of the same injury. *Id*. at 43. Accordingly, to Dr. Kinnett's statement, that he could not tell what was an aggravation and what was a natural progression, and the fact that Claimant had sever back problems prior to his alleged injury, constitutes substantial evidence to rebut the presumption of causation. Thus, the issue of causation must be based on the record as a whole with the Claimant bearing the burden of proving causation by a preponderance of the evidence.

B(3) Causation Based on Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Brown*, 194 F.3d at 5. If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Id*. *See also Greenwich Colleries*, 512 U.S. at 281.

B(3)(a)Claimant Pre-Injury Impairments

On January 18, 1995, Claimant was injured in a motor vehicle accident when another driver rear-ended Claimant. (EX 9, p. 16). Claimant presented to Dr. Reed on January 20, 1995, complaining of neck pain, left shoulder pain and left side pain that traveled down his left leg. *Id*. After recommending the use of a cream, Claimant came for a follow up on January 27, and February 3, 1995, indicating that he was not as sore, but he still had sharp pains down his left leg, a sore left shoulder, numbness in the fourth and fifth left fingers, and soreness in his neck. *Id*. at 14-15. On February 14, 1995, Dr. Reed opined that Claimant had an ulnar injury to his elbow with a possible injury to the C-8/T-1 root. (EX 9, p. 19).

On February 22, 1995, Claimant was diagnosed with C-7/T-1 denervation, and an MRI revealed spinal stenosis due to arthritis which pre-existed his motor vehicle accident. *Id*. Testing also revealed a central disc herniation with bilateral root involvement at 5/6, a herniation at 6/7 which was compressing the

spinal cord, and osteophyte at 4/5 along with broad disc herniation. Claimant also had arthritic changes at 3/4 that were unrelated to the motor vehicle accident. *Id*. The following September, Claimant had a second motor vehicle accident and complained of neck pain among other symptoms. *Id*. at 12.

Dr. Kinnett, an orthopaedic surgeon, first treated Claimant on June 2, 1995, in relation to severe pain in the posterior cervical area primarily on the left posterior shoulder that was aggravated by rotation of the cervical spine to the left and by left lateral bending following a January 18, 1995 motor vehicle accident. (EX 8, p. 11). A physical exam revealed a limited range of motion with weakness of the intrinsic musculature in the left hand. *Id*. A film of the cervical spine indicated disc space narrowing at L4-5, 5-6, and 6-7. *Id*. Disc narrowing was most notable at L5-6, and that area also had an anterior osteophyte formation and a suggestion of a neural foraminal stenosis. *Id*. Dr. Kinnett also found evidence of 'posterior protrusion at 4-5 and 6-7, and to a greater extent at 5-6, with bilateral neural foraminal encroachment, but did not see any fractures or dislocations. *Id*. An MRI of the cervical spine on February 16, 1995, showed evidence of a herniated nucleus pulposus of C5-6 with bilateral neural forminal impingement. *Id*. at 10. A central right-sided C6-7 disc herniation abutted the central cord and there was also posterior osteophyte formation with disc protrusion at 4-5. *Id*.

By June 26, 1995, Claimant's condition had not shown any improvement and Claimant elected to undergo an anterior cervical discectomy at C5-6 with a left iliac crest bone graft. *Id*. On December 18, 1995, Claimant returned to Dr. Kinnett and related that he had no numbness, paresthesias, motor weakness, headaches or neck pain. *Id*. Indeed, a physical exam revealed that all his wounds were benign and x-rays showed excellent maintenance and alignment. *Id*. On June 7, 1996, Dr. Kinnett remarked that Claimant's graft was stable and on January 15, 1997, fourteen months post-surgery, Dr. Kinnett opined that Claimant was asymptomatic and Dr. Kinnett released Claimant to return to his regular form of employment. *Id*. at 8.

B(3)(b) Claimant's Post-Injury Impairments

After allegedly injuring himself at work on September 8, 1997, Claimant visited Dr. Kinnett on September 17, 1997, complaining of stiffness in the posterior cervical area, numbness in the fingers of the left hand and pain in the trapezius area after stacking boxes weighing thirty to sixty pounds in the hull of a ship for nine hours. *Id*. at 7. A x-ray revealed solid arthrodesis at C5-6, minimal narrowing at C4-5 and C6-7 disc levels with some evidence of neural foraminal stenosis. *Id*. Dr. Kinnett diagnosis was a possible cervical radiculopathy and he issued work restriction limiting Claimant to lifting twenty pounds with no overhead work. *Id*.

Claimant's cervical complaints resolved "nicely" by October 15, 1997, but without a specific antecedent event, Claimant experienced severe pain in his right shoulder. *Id*. at 6. Dr. Kinnett diagnosed

the problem as impingement syndrome with rotator cuff tendinitis and resolving cervical disc disease. *Id*. Because of the new symptoms Dr. Kinnett extended Claimant's work restrictions and recommended that Claimant undergo training for a new vocation. *Id*. On a April 1, 1998, return visit, Dr. Kinnett detected solid, stable anterior cervical anthrodesis and multilevel disc disease with neural foraminal stenosis as evidenced by "marked narrowing of the disc spaces at two levels above [C6-7]." *Id*.

An MRI performed on November 5, 1998, showed cervical disc disease a 4-5, solid union at 5-6 and a herniated disc at 6-7. An EMG study performed on November 16, 1998, was consistent with bilateral early ulnar neuropathy as well as C4-5, 5-6 radiculopathy and Dr. Kinnett opined that Claimant may need more surgical intervention in the future. *Id*. at 4. By September 20, 1999, however, Claimant elected to continue with cervical precautions and at follow up visit on September 20, 2000, Claimant continued to complain of limitation in his range of motion. *Id*. at 3. A x-ray showed evidence of cervical disc disease at 4-5 and 6-7. *Id*. On October 9, 2000, Claimant related that he had trouble backing up his automobile because he could not turn far enough to see out of the back windshield. *Id*. at 2. On Claimant's last documented treatment date, November 19, 2001, Dr. Kinnett remarked that Claimant still had significant problems with his left shoulder, marked weakness, inability to abduct, and inability to use his upper extremity effectively. (CX 53, p.1).

B(3)(c) Comparing the Objective Medical Evidence

Accordingly, the only difference in the diagnostic data after September 8, 1997 is that Claimant had rotator cuff tendinitis, possible cervical radiculopathy, bilateral early neropathy, and impingement syndrome. In his deposition, Dr. Kinnet stated that he was unsure whether Claimant had sustained an injury, but he thought Claimant's symptoms were secondary to his pre-existing "cervical disc disease and the aggravation of that disease by the activities [Claimant related] in his history." (CX 55, p. 23). Thus, Dr. Kinnett fairly related all of Claimant's symptoms to pre-existing conditions. Dr. Kinnett did not clearly relate which diagnostic conditions were directly due to the September 8, 1997 injury, but related that the symptoms were due to an accentuation of the earlier injury as related by the history given to him by the Claimant. *Id.* at 37. Thus, because I do not find Claimant to be a credible witness, his statement alone is insufficient to establish causation and there is not objective medical evidence establishing that Claimant's symptoms are due to a work-related injury on September 8, 1997.

Regardless of the physical evidence, circumstances underlying Claimant's claim for compensation belie Claimant's assertion that his September 8, 1997 injury caused his harm. First, a major factor supporting Claimant's assertion of causation is the fact that Dr. Kinnett had released him to return to work in "his usual form of employment" in January 1997. On September 17, 1997, following his accident, Dr. Kinnett imposed restrictions that would prohibit Claimant from lifting over twenty pounds with both hands. (CX 13; CX14). On October 15, 1997, Dr. Kinnett lifted Claimant's restrictions in regards to the cervical area, but since Claimant could not lift with his right upper extremity, Dr. Kinnett continued the restrictions.

(EX 8, p. 6; CX 55, p.28). Thus, Claimant's condition would appear to be worse after the accident than before. At his deposition, however, Dr. Kinnett stated that when he released Claimant to return to work in his "usual form of employment" he thought that Claimant was a heavy equipment operator, and did not contemplate that Claimant would be undertaking heavy work as a longshoreman. (CX 55, p. 17). Likewise, in Claimant's ADA litigation he stated:

> Q: . . . Did the doctor ever provide you anything in writing regarding any of these types of restrictions?
>
> A: Not in January. . . . No, he didn't because I didn't have the work that I would be able to go back to do. If it was mechanic work, I didn't have no (sic) problem doing it. . . . I didn't have to lift no (sic) object over my head doing mechanic work. . . . I really didn't know my restrictions until after I got down off in the hold. And then after I got off in the hold and started lifting, that's when I found out that I really couldn't do that work.
>
> Q: Is it a fair statement, since you really didn't know what your restrictions were in January, nobody at the union or ITO or any of those people didn't really know what your restrictions were?
>
> A: . . . . [M]y doctor didn't give me anything, because he was under the impression that I was going back to do heavy equipment work, operator, or I was going back to do heavy equipment maintenance work . . . .

(EX 18, p. 32-33).

Accordingly, Dr. Kinnett released Claimant to return to a specific type of work, and Claimant's longshore employment, throwing frozen chickens, was most likely an inappropriate job. Therefore, I find that Dr. Kinnett's January 1997 release to return to work, which did not contain any restrictions, would likely have contained restrictions had he known that Claimant was returning to heavy labor. Without a prior statement by Dr. Kinnett regarding Claimant's restrictions had he known Claimant was returning to work on the chicken boat, I cannot determine whether the restrictions imposed on Claimant After September 8, 1997 would be any different.

Second, on numerous occasions Claimant himself denied ever having received an injury on September 8, 1997. On September 29, 1997, Claimant responded to a discovery request asserting that he had not suffered any injury in any accident on September 8, 1997. (EX 16, p. 4). Similarly, on November 25, 1997, Claimant denied ever having received any type of injury as a longshoreman. (EX 17,

p. 29). Then, on or about July 15, 1997, Claimant filed a lawsuit against the automobile driver responsible for his 1995 automobile accident. (EX 15, p. 4). As part of that lawsuit, Claimant alleged that he was totally and permanently disabled from pursuing his career as a longshoreman. *Id.*

Third, on September 21, 1997, shortly after the September 8, 1997 incident, Claimant installed a four ton air conditioning unit and a four ton coil for Head Start. (EX 12, p. 116). In a treatment note, dated October 15, 1997, Dr. Kinnett remarked that about ten days prior Claimant had experienced pain in the right shoulder without a specific antecedent event. (EX 8, p.6). Even crediting Claimant's testimony that he enlisted help to install the unit, the mere fact that Claimant undertook this task belied the fact that Claimant suffered an injury on September 8, 1997.

As discussed *supra*, I find that: Claimant is not a credible witness; Claimant has a suspect history for abusing the legal process; Claimant did not timely relate the fact of injury to Employer; the only person to fairly relate the fact of injury to Claimant's work is Dr. Kinnett, who did so based on the uncorroborated statements made to him by Claimant; there is acrimonious relationship between Claimant, and the Employer and Local 1303; and that Dr. Kinnett was unable discern what symptoms are due to the September 8, 1997 injury and what symptoms are due to Claimant's pre-existing condition. Furthermore, I do not find that impingement syndrome, bilateral ulnar neuropathy, rotator cuff tendinitis and cervical radiculopathy are such distinct symptoms to be separated from the natural progression of Claimant's 1995 auto injuries. These facts, individually, and when combined with the fact that: Claimant only worked for one day, Claimant denied ever having suffered an injury at work until after his automobile accident case had settled, and Claimant continued to work after his injury, even installing a four ton air-conditioning unit, lead me to conclude that, based on the record as a whole, Claimant has not met his burden of proving a causal relationship by the preponderance of the evidence, thus Claimant's petition for benefits under the Act is DENIED.

Should the Board determined that a causal relationship exists, however, I shall determine the remaining issues in this case.

C. Nature and Extent of Injury

Claimant seeks continuing temporary total disability benefits from the date of the accident and continuing. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968);

Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

C(1) Nature of Claimant's Injury

As discussed *supra*, the only objective changes in Claimant's condition were that Dr. Kinnett diagnosed rotator cuff tendinitis, resolving cervical disc disease, bilateral early ulnar neuropathy, possible cervical radiculopathy and impingement syndrome. And as reflected in Dr. Kinnett's October 15, 1997, treatment notes, Claimant experienced pain in his right upper extremity such that he could not lift heavy objects.

C(2) Extent of Claimant's Disability

Again, the only physician to elicit the extent of Claimant's injuries was Dr. Kinnett. On January 15, 1997, fourteen months after Claimant's surgery at C5-6 stemming from his auto accident, Dr. Kinnett opined that Claimant was asymptomatic and Dr. Kinnett released Claimant to return to his regular form of employment. (EX 8, p. 8). At his deposition, Dr. Kinnett explained what he met when he issued this work release. (CX 55, p. 17). For him "usual form of employment" met Claimant was to return to his former job as a heavy equipment operator. *Id*. He did not contemplate that Claimant would be undertaking heavy work as a longshoreman. Likewise, in Claimant's ADA litigation he related that he did not know what his restrictions were, only that Dr. Kinnett had approved him to return to mechanic's work, or work as a heavy equipment operator. (EX 18, p. 32-33).

Accordingly, Dr. Kinnett released Claimant to return to a specific type of work, and Claimant's longshore employment, throwing frozen chickens, was likely an inappropriate job. On September 17, 1997, Dr. Kinnett diagnosed a possible cervical radiculopathy and issued work restriction limiting Claimant

to lifting twenty pounds with no overhead work (EX 8, p. 7). Claimant's cervical complaints resolved "nicely" by October 15, 1997, but without a specific antecedent event, Claimant experienced severe pain in his right shoulder. *Id*. at 6. Because of the new symptoms Dr. Kinnett extended Claimant's work restrictions and recommended that Claimant undergo training for a new vocation. *Id*. Specifically, Dr. Kinnett noted that Claimant could not lift with the right upper extremity. *Id*. On October 9, 2000, Claimant related that he had trouble turning his body to back-up his vehicle. *Id*. at 2. On Claimant's last documented treatment date, November 19, 2001, Dr. Kinnett remarked that Claimant still had significant problems with his left shoulder, marked weakness, inability to abduct, and inability to use his upper extremity effectively. (CX 53, p.1). By April 1, 1998, Dr. Kinnett stated that Claimant's shoulder problems had "resolved." (Tr. 210; CX 12, p. 6).

Dr. Kinnett would limit Claimant's ability to work by prohibiting him from undertaking activities that would "load the cervical spine such as lifting with the upper extremities or precarious positions of the head or using the head as a device to apply force either supporting or lifting objects." (CX 53, p.28). Additionally, Dr. Kinnett would restricted Claimant's activities in regards to his shoulder to avoid any activity that would accentuate his symptoms and further damage his rotator cuff. *Id*. Specific restriction could more easily be defined if Claimant underwent an MRI and additional data was obtained. *Id*.

Also, Dr. Kinnett stated that a person with cervical disc disease could have waxing and waning pain without an antecedent to traumatic event. *Id*. at 42. Dr. Kinnett further stated that the 1997 injury to Claimant's cervical spine was an accentuation of the pre-existing disease. *Id*. at 43. In regards to an earlier treatment note that Claimant had resolving cervical disc disease, Dr. Kinnett related that an appearance of a complete resolution could have been merely an interlude in a continuing course and he could not distinguish when a cervical disc disease had resolved and when symptoms are a continuum of the same injury. *Id*. at 43.

Accordingly, the extent of Claimant's injury is such that he suffers from waxing and waning pain in relation to his cervical disc disease. Following his workplace accident Claimant was restricted to lifting twenty pounds in both hands and prohibited from doing overhead work. On October 15, 1997, Dr. Kinnett lifted Claimant's restriction to his cervical area, but continued Claimant's restrictions by prohibiting him from lifting anything with his right upper extremity. On April 1, 1998, Dr. Kinnett lifted the latter restriction and reinstated the restrictions issued on September 17, i.e., no lifting more than twenty pounds with both hands and no working over-head. As noted by Ms. Favaloro, these restrictions were not compatible with work in the air-conditioning and refrigeration business. (EX 13, p.2).

C(3) Maximum Medical Improvement

The traditional approach for determining whether an injury is permanent or temporary is to ascertain

the date of maximum medical improvement (MMI). *Burley v. Tidewater Temps, Inc.*, 1999-LHC-1679, WL 1880760 (DOL Ben.Rev.Bd. Dec. 7, 2000). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Stevens v. Locheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). *Care v. Washington Metro Area Transit Auth.*, 21 BRBS 248, 251 (1988).

An employee is also considered permanently disabled if he has any residual disability after reaching MMI. *Trask v. Locheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). A condition is permanent if the claimant is no longer undergoing treatment with a view toward improving his condition, *Leech v. Service Eng'g Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized. *Lusby v. Washington Metro. Area Transit Auth.*, 13 BRBS 446, 447 (1981). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that MMI has been reached. *Dixon v. John J McMullen & Assocs.*, 19 BRBS 243, 245 (1986); *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. *Worthington v. Newport Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986); *White v. Exxon Co.*, 9 BRBS 138, 142 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

Here, no physician has determined that Claimant reached maximum medical improvement. In fact, Dr. Kinnett stated on November 19, 2001, Claimant's last documented treatment date, that Claimant still had significant problems with his left shoulder, marked weakness, inability to abduct, and inability to use his upper extremity effectively. (CX 53, p.1). At his December 4, 2001, deposition, Dr. Kinnett stated that a new MRI was needed, but that Claimant was a candidate for neck and cervical surgery. (CX 55, p. 29-30). Also, Claimant would be a candidate for future surgery if symptoms related to his cervical disc disease began to interfere with Claimant's activities of daily living. *Id*. Claimant testified at the Hearing that he continued to experience pain, numbness, and stiffness in his fingers, neck and shoulders, as well as trouble turning his body, pain while laying on his side and pain when trying to carry objects. (TR. 145-47). Accordingly, Claimant has not yet reached maximum medical improvement.

D. Prima Facie Case of Total Disability and Suitable Alternative Employment

D(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former

employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, there is no dispute that Claimant cannot return to his former job as a longshoremen throwing frozen chickens, thus Claimant established a *prima facie* case of total disability.

D(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). A finding that a Claimant has not reached maximum medical improvement does not preclude a finding that a Claimant is capable of working in alternative employment. *Neace v. Army/Air Force Exchange Service*, 30 BRBS 364, 371 (1996(ALJ), citing, *Hayes v. P&M Crane Co.*, 23 BRBS 389, 392 (1990); *Price v. Dravo Corp.*, 20 BRBS 94, 96 (1987). In determining a claimant's earning capacity for suitable alternative employment, the Board has indicated that it is proper to take an average pay of all the jobs reasonably available. *Avondale Industries, Inc. v. Pulliam*, 137 F 3d. 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc. v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997)(holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is the capable of performing or capable of being trained

> to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

Here, Ms. Favaloro, a vocational rehabilitation counselor, met with Claimant on December 3, 2001, and issued a report on December 7, 2001, complementing a report that she had undertaken on November 20, 2001, without the benefit of having met Claimant. (Tr. 18-19; EX 13). Vocational testing revealed that Claimant could identify words on the fifth grade level, read and understand language at the ninth grade level, and that Claimant had a mathematical ability between the sixth and seventh grade levels. (TR. 21; EX 13, p. 4).

Ms. Favaloro reported that Claimant had achieved transferrable skills, such as the ability to apply commonsense, understanding, how to carry out instructions, how to keep records, and how to use tools. (Tr. 23). According to the Dictionary of Occupational Titles, Claimant's work as a air-conditioning and refrigeration mechanic requires general intelligence in tasks dealing with verbal and numerical skills. (Tr. 24).

In her December 7, 2001, report Ms. Favaloro identified full-time jobs that were compatible with Claimant's transferable skills in the Gulfport, Mississippi. (Tr. 27, 31; EX 13, p. 5-6). Those jobs were: Valet Dispatcher, Projectionist, Assembly Worker, Unarmed Security Guard, Fuel Desk Agent, and Dispatcher, all of which paid between $6.00 and $7.50 per hour. (EX 13, p. 5-6). Ms. Favaloro related that all of these positions were within the lifting restrictions set by Dr. Kinnett, i.e., no lifting over twenty pounds and no overhead work. (Tr. 30).

I find, however, that the position as a valet dispatcher is not suitable because, as documented in the record, Claimant has stated difficulty backing an automobile up due to cervical pain. (EX 8, p. 2). Also, I do not find that the identified position as an assembly worker is suitable because such work would require Claimant to extend at the neck for long periods, and as established by Dr. Carthane, such extension would likely aggravate his cervical problems. (Tr. 83). Likewise, the job as a dispatcher is inappropriate because it is a sedentary position that would require flexation of the cervical spine and the Ms. Favaloro's report does not indicate Claimant's ability of effectively communicate. I do not find the position as a fuel desk agent appropriate because it entails stocking and lifting up to twenty-five pounds, thus violating Dr.

Kinnett's lifting restrictions. (CEX 8, p. 7; CX 55, p. 28). The remaining two jobs, a projectionist, paying $7.50 per hour, and an unarmed security agent, paying $7.00 per hour, appear appropriate as I find that they fit within the modified-light duty positions recommended by Dr. Carthane.

I do not find that claimant is capable to performing other air-conditioning and refrigeration work in the Gulfport area. The jobs identified by Ms. Favaloro do not reflect whether such positions are appropriate considering Claimant's age, education, capabilities, and experience. As Ms. Favaloro testified, she only contacted those employers to determine what the prevailing rate for air-conditioning and refrigeration work was in the Gulfport area, not to determine whether those employers would hire a person such a Claimant given his condition. (Tr. 52). As related by Dr. Carthane, Claimant would have to hire a helper to perform the job as Claimant would be unable to perform all of the work himself. (Tr. 82). Accordingly, I find that Employer has shown suitable alternative employment at $7.25 per hour.

E. Average Weekly Wage and Entitlement to Partial Disability Payments

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

E(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Here, Claimant only worked for Employer one day, thus Section 10(a) cannot apply.

E(2) Section 10(b)

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan*, 24 BRBS at 153; *Lozupone*, 12 BRBS at 153. Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly

wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. *Palacios*, 633 F.2d at 842; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lozupone*, 12 BRBS at 153. Here, Employer submitted the wage records of other Longshoremen, but neither party asserts that such employees are in the same class in the same or similar employment. Using the wages of other workers in an Section 10(b) analysis would be inappropriate because each individual can work as much or as little as he wants depending on the amount of work available and using Section 10(b) would give the Claimant the benefit of another worker's earnings that may have a better or worse records than Claimant would have had if he worked more than one day. Accordingly, Section 10(b) is not applicable.

E(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly", then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986).

Here, Claimant was only employed for one day. His employment was on the "chicken boat" throwing thirty-five to forty pound boxes of frozen chickens in the frozen hold of a vessel. (Tr. 123-24). This was not the type of work envisioned by Dr. Kinnett or Claimant when Dr. Kinnett released Claimant to return "to his usual form of employment" in January 1997. (EX 8, p. 8; EX 18, p. 32-33). Because Claimant could not perform the job, it did not constitute suitable work, thus, I do not find it inappropriate to base Claimant's pre-injury earning capacity on work that was inappropriate and work that Claimant was unable to perform.

Therefore, I find that Claimant's pre- injury earning capacity is best reflected Under Section 10(c) by the work he performed as an air-conditioning and refrigeration mechanic. Records from Head Start reflect that Claimant earned $3,061.05 in 1997 prior to his accident. In the final three and one-half months after his accident, however, Claimant earned $6,717.40. (EX128, p. 6). No testimony reflects that Claimant' ability to perform this job was curtailed after his September 8, 1997 injury. Indeed, in the two weeks after his work-place accident he installed a four ton air-conditioning unit and coil. (EX 12, p. 116). Thus, Claimant suffered no loss of wage earning capacity after his work-related injury as Claimant continued in the same employment. Because Claimant's contract with Head Start has not changed, it is unnecessary to calculate Claimant pre and post-earning wage earning capacity because he has suffered no economic loss. Accordingly, Claimant is not entitled to any partial disability payments.

E(4) Nominal Awards For Injuries Not Diminishing Wage Earning Capacity

The Supreme Court decision in *Metropolitan Stevedores Co. v. Rambo (Rambo II)*, 521 U.S. 121, 138, 117 S. Ct. 1953, 1963, 138 L. Ed. 2d 327 (1997), approved the practice of allowing *de minimus* or nominal awards in certain situations where the claimant has a proven work-related medical disability which has not diminished his present wage earning capacity. *See also Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 773 (5th Cir. 1981)(finding it appropriate to grant a small award "fashioned expressly for the purpose of preserving Claimant's right to receive compensation should disability in an economic sense ever visit him"). A nominal award is appropriate where there is "significant potential that the injury will cause diminished capacity under future conditions." *Rambo II*, 521 U.S. at 138, 117 S. Ct. at 1963. This holds open the possibility for modification of an award under 33 U.S.C. § 922[9] if future events or circumstances change a potential disability into an actual one. *Id.* at 136, 1962. Without such an award, § 922 would work to deny claimants of compensation for a future loss of earning capacity which resulted directly from their work-related injury simply because they had the present opportunity to earn wages at a pre-injury level.

[9] Section 922 allows for a modification of an award of compensation at any time within one year after the last payment of compensation. 33 U. S. C. § 922.

Here, Claimant has not yet reached maximum medical improvement and his condition may further deteriorate even if he has surgery. Accordingly, I find it appropriate to award a nominal sum of $1.00 per week should disability in the economic sense ever visit him.

F. Medical Benefits

In general an employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140-41 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300, 302-03 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Company*, 22 BRBS 32, 36 (1989); *Dean v. Marine Terminals Corp.*, 7 BRBS 234, 238 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515, 517-18 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356, 358 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278, 281-82 (1978).

In *Shahady v. Atlas Title & Marble*, 13 BRBS 1007, 1010 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 307-08 (1989); *Jackson v. Ingalls Shipbuilding Division, Litto Systems, Inc.*, 15 BRBS 299, 306 (1983). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc., v. Neuman*, 440 F.2d 908, 911-12 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185, 189 (1986).

Under Section 7(d)(1), an injured employee cannot receive reimbursement for medical expenses which he provided payment unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency, refusal, or neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983). The burden of proof regarding compliance with this requirement is on the employee. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 407 (4th Cir. 1979).

Pursuant to Section 7(c)(2) of the Act an employer must authorize medical treatment by a claimant's physician of choice. However, once a claimant has made his initial, free choice of physician, he may change

physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406. A claimant's right to an initial free choice of physician pursuant to Section 7(b) does not negate the prior request requirement. *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956, 957-58 (1982); *Betz v. Arthur Snowden Co.*, 14 BRBS 805, 809 (1981). The employer will ordinarily not be responsible for the payment of medical benefits if the claimant fails to obtain the required authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Consent to change physicians shall be given when the claimant's initial choice was not a specialist whose services are necessary and appropriate for proper care an treatment. In the instant case, Claimant has never requested medical authorization from Employer. (Tr. 219). It is undisputed that Claimant did not follow the procedures in Section 7(d) in that neither Claimant nor his physician submitted a claim to Employer or Carrier showing that the nature of the injury required Dr. Kinnett's treatment or services. Accordingly, as authorization for treatment was not obtained and no evidence suggests an exception for emergency or neglect applies.

G. Penalties

Under Section 30(a), an Employer has ten days to send a report of injury to the Secretary and the deputy commissioner, or else the employer will be subject to a ten-thousand dollar fine. 33 U.S.C. §§ 930(a) & (e) (2001). As determined *supra*, Employer first had knowledge of an injury on May 29, 1998, making their June 1, 1998 Notice of Controversion timely.

H. Conclusion

I do not find that Claimant made a credible witness. Claimant's Notice of Injury, given to Employer on May 29, 1998, for a traumatic injury Claimant fairly related to his physician on September 17, 1997, was untimely. Employer satisfactorily showed prejudice to rebut and overcome the presumption in Section 20 that a timely notice of injury was given, and Claimant failed to show that an exception under section 12(d) applied. Employer was prejudiced by the fact that the late notice deprived it of the opportunity to sever the causal connection between Claimant's injury and employment by having a timely medical examination, was deprived of obtaining a timely second opinion medical evaluation and the employer proved that the passage of time has made it difficult to investigate the alleged accident as it diligently searched and could not locate the lone witness to the event. Based on Claimant's late filed Notice, his entitlement for Benefits are DENIED.

Alternatively, I find that Claimant timely filed a claim under the Act by sending a written letter to Employer, but, Claimant failed to prove a *prima facie* case of causation because, outside of Claimant's discredited assertions, there is no credible evidence that an event occurred or that conditions existed a work that caused or could have caused his impairment. Failing that, however, Employer presented substantial

evidence to rebut the Section 20(a) presumption and based off the record as a whole, Claimant failed to establish, by a preponderance of the evidence that his work caused or could have caused his harm.

Alternatively, Claimant established that he has not reached maximum medical improvement. The nature and extent of his injury is such that he cannot lift more than twenty pounds and cannot perform overhead work. However the extent of Claimant's injury does not impact his wage earning capacity as he is capable of performing the same work after his injury as he was performing prior to his injury. Thus, while the employer proved suitable alternative employment at $7.25 per hour, such a determination was not necessary as Claimant suffered no loss in wage earning capacity. Nonetheless, Claimant would be entitled to a nominal award because he has not yet reached maximum medical improvement and his condition could deteriorate and disability could visit Claimant in the economic sense. Claimant is not entitled to reimbursement for medical expenses because no exigent circumstances were present justifying a failure to obtain prior authorization. Claimant is not entitled to a Section 14 penalty due to an untimely controversion, because Employer timely controverted the claim after receiving Claimant's written letter notifying Employer that he suffered a work related injury.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

Claimant's entitlement to benefits under the Act is DENIED based on Claimant's failure to provide the Employer with a timely notice of Injury under Section 12 of the Act.[10]

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[10] Alternatively, I find that Claimant's entitlement to compensation under the Act is DENIED based on Claimant's failure to show a *prima facie* case of causation.

Alternatively, I find that Claimant's entitlement to Benefits under the Act is DENIED based on Claimant's failure to establish causation based on the record as a whole.

Alternatively, based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following ORDER:

1. Claimant has not established that his injury created a loss in wage earning capacity, thus,

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

Claimant is entitled to a nominal award of $1.00 per week.

2. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act; except that employer is not responsible for any past medical care due to a failure of Claimant to request authorization pursuant to Section 7 of the Act.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the weekly average one year constant maturity Treasury yield as published by the Federal Reserve System for the week preceding the date of judgment in accordance with 28 U.S.C. §1961. *See* http://www.federalreserve.gov/releases/h15/current (last visited March 26, 2002).

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.